Supreme Court, U.S.
FILED

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

R. WILLIAM GRAHAM - PETITIONER

VS.

MARCIA J. MENGEL, Clerk of Supreme Court of Ohio and Secretary of the Board of Bar Examiners, et al., - RESOPNDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUT

PETITION FOR WRIT OF CERTIORARI

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170 pp

I. THE QUESTION PRESENTED

A bar examiner violates professional standards and practices for grading examinations when he does not apply the same minimum competency percentage score set for the overall exam to the answers he graded, and, thus there occurs a break in the rational connection between test results and an examinee's fitness and capacity to practice law, and consequently, to preclude an examinee from practicing law for not passing such an exam denies an examinee the right to practice law for "reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."

PARTIES TO THE PROCEEDINGS AND THE COURTS BELOW

R. WILLIAM GRAHAM,
PETITIONER,

and

THE SUPREME COURT OF OHIO ITS MEMBERS AND CLERK AND BOARD OF BAR EXAMINERS:

THOMAS J. MOYER, A. WILLIAM SWEENEY, ROBERT E. HOLMES, ANDY DOUGLAS, J. CRAIG WRIGHT, HERBERT R. BROWN, ALICE ROBIE RESNICK;

MARCIA J. MENGEL;

MICHAEL L. GORDON, INDRA K. SHAH, LESLIE W. JACOBS, PHILLP J. CAMPENELLA, KEITH MCNAMARA
JAMES F. DELEONE, LARRY H. JAMES, KATHLEEN M. TRAFFORD, ALAN C. TRAVIS, FREDERICK BYERS, JOHN A. HARRIS III, and THEODORE G. GODORF.

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STATEMENT OF JURISDICTION OF THIS COURT

The Supreme Court of Ohio's Entry in this matter was filed on April 25, 1995. This Court's Jurisdiction is invoked under Title 28, U.C.S.§ 1257 and is set forth in Appendix J.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment of the United States Constitution is set forth in Appendix L, Title 28 U.S.C. §1331, 1343 (a) set forth in Appendix K and Const IV § 2 in Appendix M.

II. STATEMENT OF THE CASE

This case originated with the petitioner, R. William Graham, filing a complaint against the Clerk of the Supreme Court, individually and in her official capacities as Clerk and Secretary of the Board; each Justice of the Supreme Court, individually and in their official capacities; and each member of the Board, individually and in their official capacities for violations of his rights as guaranteed by the Fourteenth Amendment of the United States Constitution as well as the Ohio Constitution. Petitioner initially sought review in the United States District Court for the Southern District of Ohio, Western Division, wherein the District Court made certain findings of fact, but ultimately dismissed for lack of subject matter jurisdiction. Petitioner appealed the District Court's

decision as to whether it had jursidiction, however, the Court of Appeals for the Sixth Circuit affirmed the District Court's decision. Peitioner filed a Petition for Writ of Certiori to the United States Supreme Court for review of the Court of Appeals for the Sixth Circuit's decision, but his petition was denied.

After the District Court's decision, Petitioner filed a complaint with the Supreme Court of Ohio, wherein the Court dismissed for lack of jurisdiction. Petitioner filed another Petition for Writ of Certiori to the United States Supreme Court to review the decision of the Supreme Court of Ohio, but this petition was likewise denied.

Finally, Petitioner filed his claim in the Court of Claims of Ohio, wherein such Court dismissed Petitioner's claims

against all defendants and retained jurisdiction for declaratory purposes only. In his complaint, Petitioner alleges that one examiner graded answers without reference to the minimum competency grade set for each answer and for the overall exam, that being the score of 7.5 points out of 10 points, or 75 percent of the total point score possible on the examination (270 out of 360 points), and that such act thereby "broke the rational connection" between Petitioner's examination results and his fitness or capacity to practice law.

The content and format of the July 1990 bar examination, the basic grading procedures with respect thereto, the scores assigned to the examinees and similar facts were established by the

pleadings and stipulation[1] in previous filings and at trial in the District Court for the Southern District of Ohio and are as follows.

The Respondents are the Clerk of the Ohio Supreme Court, the Chief Justice and Justices of the Ohio Supreme Court and the members of the Ohio Board of Bar Examiners ("Board"). The Supreme Court created the Board and delegated to it the task of assessing, by conducting the Ohio Bar Examination, the minimum competency of aplicants to practice law in Ohio.[2] During July 1990, there were 12 members of the Board. The Clerk of the Supreme Court

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[1] See Plaintiffs' Trial Filing Regarding Facts Established By the Pleadings; Stipulating As to Evidence, U.S. District Ct. C-3-90-413.

[2]The Ohio Constitution provides that the Ohio Supreme Court shall have original jurisdiction over admission to the practice of law. Art. IV, S 2(B) (1) (g).

serves as the Secretary of the Board. The Ohio Supreme Court is responsible for administering the Ohio Bar Examination and for appointing the Ohio Board of Bar Examiners, 12 practicing attorneys who create and grade the essay portion of the examination.

The Ohio Bar Examination is conducted over a three day period. The first and third days of the examination consist of 24 essay questions prepared by the members of the Board. Each of the 12 members of the Board prepares and grades two essay questions which are given during a one hour period. Each set of two essays is answered in one essay booklet. The second day of the examination is devoted to the Multistate Bar Examination ("MBE").

In July 1990, there were two methods by which an applicant could achieve a passing score. under the first method, an

Applicant could secure a passing score through the presumptive pass rule. Under this rule, an applicant achieves a passing score if he or she is in the upper 60 percentile of the MBE and he or she receives 14 points or more on each of two randomly selected essay booklets.[3] The second mode of achieving a passing score is for those applicants who do not achieve a passing score under the presumptive pass rule, i.e., those who scored in the lower 40 percentile of the MBE, or who did not score at least 14 on their two randomly selected essay books. To achieve a passing score under the second mode, the total of the scores of all of an applicant's essay questions, together with

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[3]For purposes of this random selection, members of the Board are paired. Thus, each set of two bar examiners grades one-sixth of the examinees.

his or her weighted MBE score, must equal or exceed 270 points.

The Petitioner scored in the upper 60 percentile of the MBE but did not receive at least 14 points on his two randomly selected essay books. Also, the total of the Petitioner's score on all his essay questions and his weighted MBE score did not equal or exceed 270 points. Consequently, Petitioner was deemed to have not passed the 1990 Ohio Bar Exam. For the Petitioner, one of two randomly selected essay books contained his answers to the questions of one particular member of the Board, Leslie W. Jacobs ("Jacobs"). Jacobs was easily the most stringent grader among the members of the Board. For instance, the other eleven members of the Board assigned an average score of slightly more than 15 points out of a possible 20 points to each essay booklet.

Jacobs assigned an average score of about 10 points out of a possible 20 points per exam booklet. Additionally, approximately 720 applicants scored in the top 60 percentile of the MBE. Five hundred and twenty-eight of those passed under the presumptive pass rule. Jacobs and the examiner with whom he was paired graded the essay booklets (containing answers to the questions they wrote) of 120 applicants whose score were in the top 60 percentile. Of those 120 examinees, only 13 passed under the presumptive pass rule, i.e., received a grade of 14 or more on each of the two sets of essay questions. Finally, of the 694 examinees whose two essay answers Jacobs graded, only 10 received 15 or more points.

Petitioner testified as to the calculations he performed utilizing the scores appearing in the master score sheet

of the Ohio Supreme Court with respect to the examination:[4]

a) The eleven examiners other than Mr. Jacobs assigned an average score of 15.134 points per two questions (7.56 points out of 10 possible points per question), while Mr. Jacobs assigned an average score of 10.043 points per two questions (about 5 points out of 10 possible points per question), a difference of 5.09 points per two questions; and

b) The examiners were paired for purposes of grading books in the first round of grading, wherein approximately 73.33 percent of the applicants (528 of

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[4] The master score sheet is Plaintiff's Ex. 2. All of these calculations are also explained by Mr. Graham's affidavit dated January 28, 1991 except that all of the data referred to in paragraph (e) does not appear in the affidavit. See Ex. 2 in App. to Plaintiff's Mem. file-dated Jan. 28, 1991. U.S. Dist. Ct. C-3-90-413.

720) passed. The pair of Mr. Jacobs and Mr. James passed only 13 of 120 applicant (10.83 percent), whereas the pair generating the next lowest pass percentage passed 91 of 120 applicants (75.83 percent).

Mr. Jacobs has testified[5] that no attempt known to him was made prior to grading to make sure that all twelve examiners applied a standard set of "criteria" in grading, and that he received no instruction whatsoever as to the criteria to be used in grading or the standard of competency required to demonstrate minimum competency with respect to that criteria. He swore that he did not understand that a score of 7.5 points on an answer corresponded with

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[5] U.S. Dist. Ct. C-3-90-413 R.42 P.7

minimum competency[6]. Mr. Jacobs testified that he employed his own criteria - - including that of proficiency in spelling, grammar - - and assigned scores from zero to ten in accordance with his own grading system which had no relation whatsoever to the grading system established for the exam wherein 7.5 points corresponds with minimum competency[7].

Expert testimony also established that instruction as to the pass/fail line that had been established to demonstrate minimum competency with respect to an examinee's answer is critical to ensure scoring consistency[8].

Petitioner asserts he should have

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[6] ID at R.44 pp. 205-207

[7] Ohio Law, Jan 1989, Volume 2, No.1; Gov. Bar R.1 § 4(c).

[8] U.S. Dist. Ct. C-3-90-413, R.44 pp.

received a passing score on the bar exam, but that he did not because of one examiner's grading violations and the additional failure of Respondents to properly administer the bar exam. Appellant further contends that these actions violated his due process rights as guaranteed under both the federal and state Constitutions. Ohio Constitution I §16, 42 U.S.C. §§ 1983, 1985.

By pre-screening entry of May 14, 1992, the Court of Claims dismissed all named individuals from this action pursuant to R.C. 2743.02. On February 18, 1994, the Court of Claims granted Respondents' motion for summary judgment.

Petitioner appealed the Court of Claims' decision to the Court of Appeals for the Tenth Circuit of Ohio. The Court of Appeals affirmed the Court of Claims' decision in its entry of judgment on

September 5, 1995. Petitioner appealed to the Court of Appeals' decision to the Supreme Court of Ohio, but the Court denied jurisdiction to hear the case on April 25, 1995.

As such, Petitioner respectfully believes that this case is now proper to be heard in this Court as it presents an issue of law wherein the Supreme Court of Ohio has in effect rendered its decision as to Petitioner's claim, such decision is submitted to be in direct conflict with the law of this Court and other courts, and Petitioner has exhausted all other possible courts for relief.

SUMMARY OF THE ARGUMENT

The Supreme Court of the United States has said that a state cannot stop a person from practicing law "in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." Though a state can require high standards of qualification (before it admits an applicant to the bar), the Supreme Court of the United States has said "any qualification must have a rational connection with the applicant's fitness or capacity to practice law." Federal Appellate Courts have said that courts may review the substance of an academic decision when the decision by the professional is "a substantial departure" from accepted professional practices, standards, or norms as to demonstrate the person did not actually exercise professional judgment.

When one of the examiners of Petitioner's bar exam admitted he did not apply the same minimum competency percentage score set for the overall exam to the answers he graded, he violated professional practices, standards,, and norms in grading because it is the adoption of a uniform minimum competency score for each answer that **produces** the minimum competency percentage score which was set for the overall exam. Consequently, there occurred a "break in the rational connection" between the test results and the Petitioner's fitness and capacity to practice law, and, therefore, to preclude Petitioner from practicing law for not passing such an exam denied Petitioner the right to practice law for "reasons that contravene Due Process and Equal Protection Rights."

III. ARGUMENT

It is a firmly established rule of law that a state cannot stop a person from practicing law or any occupation "in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." Schware v. Board of Bar Examiners, 353 U.S. 232, 238 -239, 77 S. Ct. 752, 756, 1 L. Ed. 2d 796, 801 (1957); Dent v. West Virginia, , 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889). This rule of law is based on whatever rights one has to an occupation in general, Greene v. McElroy, 360 U.S. 474, 492, 79 S. Ct. 1400, 1411, 3 L. Ed. 2d 1377 (1959) (".... the right to follow a chosen profession free from unreasonable governmental interference comes within the 'Liberty' and 'Property' concepts of the Fifth Amendment.") and whatever rights one has to practice law in particular. Ex Parte Garland, (U.S.) 4 Wall. 333, 379, 18

L. Ed. 336 (1867).

In Schware, supra, Mr. Justice Black in speaking for the Supreme Court of the United States said:

> We need not enter into a discussion whether the pratice of law is a "right" or a "privlilege." Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace. Ex Parte Garland, (U.S.) 4 Wall. 333, 379, 18 L. Ed. 366 [360].

See also Willner v. Committee on Character, 373 U.S. 96, 103, 83 S. Ct. 1175, 1180, 10 L. Ed. 2d 224, 229 (1963).

In analyzing whether the "manner" or the "reasons" for the denial of a law license violates the Due Process Clause of the Fifth and/or Fourteenth Amendment to the Federal Constitution, the Court, in Tyler v. Vickery, (1975, CA5 Ga) 517 F.2d 1089, upon concluding that the safeguards of the Due Process Clause are of course available to a failing bar applicant: went on to quote Hanna v. Larche, 363 U.S. 420, 442, 80 S.Ct. 1502, 1515, 4 L. Ed. 2d 1307 (1960): " 'Due Process' is an elusive concept. Its exact boundaries are undefinable, and its content
varies according to its specific factual contexts..."

Exclusion from an occupation for "reasons" that contravene Due Process may be classified as a violation of "substantive due process", under the definition of substantive due process as

"the constitutional guarantee that no person will be deprived of his life, liberty or property for arbitrary reasons." Exlusion from an occupation in a "manner" that contravenes Due Process may be classified as a violation of "procedural due process", that is the right to notice and hearing and an essentially fair proceeding.

The fairness required in the "manner" in which the exclusion from the profession is performed was further highlighted by Chief Justice Taft in Goldsmith v. United Stated Board of Tax Appeals, 270 U.S. 117, 46 S.Ct. 215, 70 L.Ed. 494, involving an application of a certified public accountant to practice before the Board of Tax Appeals. Chief Justice Taft, writing for the Court, said:

> ...The rules adopted by the Board provide that the Board may

> in its discretion deny admission, suspend or disbar any person.' But this must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice and hearing for the applicant as would constitute due process. (Examples supplied)

See also Willner, supra. Thus, we see that procedural due process is inherently involved in requiring fairness in the "manner" in which one applies a constitutionally permissible "reason" for excluding a person from practicing an occupation.

Whether there is a "substantitive due process violation" when one is excluded from an occupation focuses upon whether the "reason" has a rational connection

with the applicant's fitness or capacity to practice his profession. See Dent, supra; Schware, supra; and Konigsberg v. State Bar of California, 353 U.S. 252, 1 L.Ed. 2d 810, 77 S.Ct. 722 (1957). The Supreme Court in Schware, supra, after stating that a state cannot exclude a person from the practice of law in a "manner" or for "reasons" that contravene the Due Process or Equal Protection Clause of the Fouteenth Amendment, went on to state:

> a State can require high standards of qualification, such as good moral character or proficiency in its law before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law... obviously an

> applicant could not be excluded merely because he was a republican or a Negro or a member of a particular church. Even in applying permissble standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously disciminatory.

The Schware Court went on to state that:

> Refusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause.

As is the case presented before this

Court, a state's Supreme Court is the body usually vested with the ultimate authority to prescribe standards to practice before it and to determine what applicants meet those standards. The function of administering the procedure for admission of applicants to the bar is usually delegated by the Court to a special committee or board to conduct the examination. Since the examination is administered and the examination papers are graded in most instances by this special committee or board, the issue thus arises as to the right of an unsuccessful applicant to have a court review the action of a bar examination board or committee with respect to the grading of a specfic paper.

The courts which have considered the constituionality of state bar examination procedures have judged those procedures in

the light of the "rational relationship" test: that is, the courts have attempted to determine whether the examination or testing procedure in question has a rational relationship to an applicant's fitness to practice law. In Application of Peterson, (1969 Alaska) 459 P.2d 703, the state court quoted the same language of the United States Supreme Court as is set forth above from the Schware case, supra, to conclude that:

> ...An applicant's rights in regard to the grading of his examination papers and his ultimate right to pursue the occupation of an attorney should be as fully protected as these same occupational rights are when questions of moral character or discipline of the applicant are involved."

(Emphasis supplied)

Of course no matter what kind of qualification is being imposed upon a person desiring to practice law, the qualification must not be arbitrary, capricious or unreasonable. Nor may the qualification offend the dictates of reason. See Schware, supra. Similarly, in order to comply with the equal protection of the laws clause under the Fourteenth Amendment to the Federal Constitution, and individual is entitled to have the same qualification applied to him as is applied to everyone else, including the right to have his examination paper graded by the same standards as everyone else. See Tyler, supra. See also Watson v. Maryland, 218 U.S. 173, 30 S. Ct. 644, 54 L. Ed. 987 (1910). When we look at the circumstances which courts suggest will

"break the rational connection" (or rational relationship) between a bar examination or testing procedure and a bar examination board's refusal to certify an applicant's fitness or capacity to practice law because of failure to pass the examination, we see that the courts employ language, suggesting as a prerequisite to review, that the applicant's petition show he was denied certification as a result of fraud, imposition, coercion, discrimination, unfairness, abuse of discretion or unreasonable conduct.

The later three prerequisites would appear to suggest conduct less agravated or extreme and, hence, would imply application of a test more liberal than the former four prerequisites. See Re Mead 372 Mass. 253, 361 NE2d 403 (must not be any partiality, prejudice or discretion

in board's methods or rules); Davidson v. New York State Board of Law Examiners, 86 Misc. 2d 744, 382 NYS2d 418) (must be no arbitrariness, capriciousness or abuse of discretion by bar examiners); Hooban v. Board of Governers, 85 Wash 2d 774, 539 P2d 686 (1985) (must be no fraud, coercion, arbitrariness or manifest unfairness); Application of Heaney, 106 Ariz 391, 476 P2d 846 (1970) (must be no fraud, imposition or coercion nor can there be any unfair, unjust, or improper grading of an examination); Petition of De Orsey (RI) 312 A2d 720 (1973) (must be no fraud, imposition, discrimination or manifest unfairness on the part of the examiners); and Application of Peterson, supra, (must be no fraud, imposition, arbitrariness or any other other ground which warrants review of his examination; also talks in terms of "abuse of

discretion" and "improper conduct" on the part of law examiners in the grading of examination papers; also speaks of the "fairness" of the examination and the grading of the papers).

The reason for holding there would be a violation of constitutional rights in the instances detailed above is evident. If the denial of the right to practice law is predicated upon an examination whose results are based on fraud, coercion, arbitrariness, imposition, discrimination, unfairness, abuse of discreteion or other unreasonable conduct, this would "break the rational connection" between the test results and any determination that the applicant lacks proficiency to practice law. Consequently, it would constitute a denial of Due Process to preclude someone from practicing law in such a situation. See Schware, supra.

It is important to understand that though a standard might "objectively" have a perfectly rational connection to an applicant's fitness or capacity to practice law, as Schware suggested, a standard can become tainted, and, hence, the rational connection between the standard and the decision to deny a professional license broken due to the way the standard is administered. In other words, how standards are administered are as important as the standard itself. As the Court in Peterson, supra, indicated, first there must be "an appropriate and properly administered bar examination", citing therein Application of Brewer, 430 P2d 150, 151 (Alaska, 1967). The Peterson Court went on to state that because there was substantial evidence showing that the grading was not improper, that the examinations in question were fairly

composed and properly administered and Petitioner's examination paper was honest and fairly graded, the decision to deny admission to the bar would be upheld.

In 1992, the Supreme Court of North Dakota was asked to invalidate the bar essay examination and/or regrade applicant's answers. The Court declined to do so where there was no evidence that the procedure employed to test applicant's qualifications was unreliable or that the essay examination was graded arbitrarily or unreasonably. Faulconbridge v. North Dakota State Bar Bd., (1992, N.D.) 483 NW 2d 780. See also, Duffy v. Holt-Harris, (1990, 2d Dept) 159 App Div 2d 542, 552 NYS2d 407 app disc without op.. (1990) 76 NY2d 772, 559 NYS2d 985, 559 NE2d 679 (procedure followed by the examiners must be rationally connected to the mandate to provide a uniform examination that fairly

tests proficiency of legal candidates.)

It is clear then that the grading procedures employed by bar examiners in scoring the results of a bar examination must not break "the rational connection" between the test results and the state's interest in assessing an applicant's competency to practice law. The test has to be administered in a valid way if the test is to be asserted as a constitutionally permissible standard to determine whether a person ought to be entitled to practice law in the state. In Application of Fink, (1953, CA 9 Alaska) 208 F.2d 898, the Court pointed out that the petition did not contain an allegation either (1) that the board failed or refused to propound a fair examination or (2) that the board failed to grade the examination fairly or (3) that the petitioners were qualified and could pass

an examination which was fairly graded.

Several Federal Appellate Courts have set down specific guidelines as to when a judge may review the substance of an acedemic decision. In Youngberg v. Romero, 457 U.S. 307, 323 (1982), the United States Court of Appeals for the Third Circut, after stating that courts must show deference to the judgment exercised by a qualified professional, went on to state:

> ... The decision, if made by a professional is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not

> base the decision on such a judgment.

In other words, when there is a substantial departure from accepted professional practice or professional standards, this will overcome the presumption that the decision of the professional is a valid one and, hence, will "break any rational connection" between the decision (i.e. to fail an applicant in an examination) and said applicant's fitness or capacity to practice an occupation.

The United States Court of Appeals for the Sixth Circuit relied on Youngberg, in deciding the case of Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985). The Court said:

> When judges are asked to review the substance of genuinely academic decisions, such as

> this one, they should show great respect for the faculty's professional judgement. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. Cf. Youngberg v. Romero, 457 U.S. 307, 323 (1982).

In conclusion, the Court went on to state that:

> ...It never the less remains true that his dismissal from the Inteflex program rested on an academic judgment that is not beyond the pale of reasoned academic decision making when

> viewed against the background of his entire career at the University of Michigan...

Clearly then, a "substantial departure from accepted academic norms" or a departure from "reasoned academic decision making" would "break the rational connection" required by the Supreme Court of the United States in Schware, supra.

Let us now enter into a discussion of what are the "accepted academic norms" of grading. Yes, what is the accepted professional practice in grading procedures? Are there, in fact, any professional or practices in grading?

Numerous courts seem to think so, including the Ninth Federal District Court in Application of Fink, supra. In that case, the Court suggested that the Board of Bar Examiners were required to grade the examinations fairly. See also

Application of Heaney, supra, wherein the Court suggested that there could be no unfair, unjust or improper grading of a bar examination; and Application of Peterson, supra, wherein the Court suggested there could be no "abuse of discretion" or "improper conduct" on the part of law examiners in the grading of the examination process. Peterson also talks in terms of the requirement of "fairness" in the grading of the papers. In RE Investigation of Conduct of Examination for Admission to Practice Law, the Court applied the test of fairness, and concluded that interference by the Court was not justified where it appeared that the examination had been duly authorized and conducted and that the grading had been done in the customary manner by application of usual standards

So there are professional standards

and professional practices in grading that are recognized by the law. Yes, there are accepted academic norms in grading which insure reasoned academic decision making; that insure that there is a "rational connection" between the passing or failing of an exam and one's actual competency in the area being tested. There is universal agreement over the fact that the bar examination is a competency test. Test administrators maintain that the bar exam tests minimal comeptency. See In Re Reardon, 378 A. 2nd 614,617 (Del.Supr. 1977) wherein the Court said:

> The primary function of the Board of Bar Examiners is to measure professional competence; the purpose of the Bar Examination is to distinguish those applicants who appear to have the minimal competence for

> the practice of law. (Emphasis supplied

See also Tyler, supra at 926, wherein the Federal Court of Appeals for the Fifth Circut said:

> ...it is certainly reasonable to assume that legal training is highly instrumental in developing the qualities that comprise "minimal competence to practice law" and that the overall performance of graduates of various institutions bears some logical relevance to how well the examination is measuring these qualities.

"The purpose of the bar examination is make sure that before a license is granted to an applicant, that person has a certain basic degree of competence," said Marcia Mengel, Clerk of the Ohio Supreme

Court who oversees administration of the test. (For quoted reference see Ohio Law, January 1989, Vol 2, Number 1).

But as to how one evaluates minimal competency or what the proper level of minimum competency should be placed at, reasonable minds differ. The former consideration is involved with the criteria that should be used to evaluate minimal competency. The latter consideration is involved with the grade which is determined to reflect minimal competency. Certainly, the decision of what the passing grade should be placed at on an examination has to be determined. However, once the grade of minimum competency is chosen for a particular examination, it is absolutely imperitive--in order to maintain the validity of the examination--that all examiners are aware of the minimum competency grade chosen for

the examination, and all examiners adhere to the same minimum competency grade when scoring the examination answers that they are assigned.

In other words, every examiner must know whether the grade he is giving on an examination is a passing grade or a failing grade. This is to prevent a fluctuating minimal competency score among the examiners. The same pass/fail standard must be applied to all examinees in order to comply with Substantive Due Process and Equal Protection Rights under the United States Constitution. Each examiner must apply, in the grading of his answers, the same scoring system (the same pass/fail minimum competency level) as every other examiner. If this is not done, there will be a "break in the rational connection" between the test results and the examinees' fitness or

capacity to practice law, because the test scores of those examinees whose examiner did not apply the same minimal competency score that the other examiners used, will be invalid. And if there is no valid test result with regard to an individual examinee, then it is not a "valid reason" to deny him the right to practice law because he did not pass the examination. The Supreme Court of the United States has said "a state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." Schware v. Board of Bar Examiners, supra. Certainly, it is invidiously discriminatory, and it offends the dictates of reason, to hold some examinees to one standard of minimum competency and other examinees to another

standard of minumum competency. This is in effect what happens when one examiner does not know whether the grade he is giving an individual is a passing score or a failing score.

In the case at bar, Dr. Ayers G. D'Costa, Ph.D (Educational Research and Measurement) testified in the Federal District Court related case that instruction as to the grade selected to demonstrate minimum competency is necessary to ensure accurate results in determining professional competency when an absolute score is used to correspond with minumum competency, and no other sort of check such as scaling is employed. Dr. D'Costa, who teaches graduate level courses on how to grade tests, the validity of tests and how to proof tests at Ohio State University, called the need for such instruction "critical" in light

of the design of the examination at issue, and material to rendering a valid examination and exercising professional judgment.

It is important to remember here that we are not talking about the need for agreement among the examiners regarding the "criteria" used in the grading. Nor are we talking about any need for uniformity regarding the weight to be given such criteria. We are talking here about the absolute necessity for all bar examiners to <u>know</u> and <u>apply</u> the <u>same</u> scoring system in their grading; the need for all examiners to apply the same pass/fail standard that was established before the bar examination was given. No one needs a Ph.D to discern the vital importance of this examination requirement. It is an accepted academic norm of grading. It is a professional

standard and a professional practice that is beyond refute. If an examiner is not aware of whether the grade he is giving passes or fails a student when an absolute score on the exam is used to correspond with minimum competency and no other sort of check, such as scaling, is built into the examination design, then the examiner's grading procedure amounts to a substantial departure from accepted professional norms, accepted professional standards, and accepted professional procedures.

Furthermore, it does not matter whether the examiner's conduct was intentional, innocent or negligent. The result is the same. The conduct produces faulty and unfair results and irregularities in the results of the exam (as it did in the case now before this Court). The conduct denies an examinee

his right to Substantive Due Process and Equal Protection.

Once a set minimum competency score has been established for an exam, this pass/fail line must be adhered to by all the graders of the exam. If the bar examination is indeed a test of minimum competecy, it is imperitive that examiners know what is the scoring system being used in the exam that reflects minimum competency. To not know this produces a "break in the rational connection" between an examinee's test score and the examinee's fitness or capacity to practice law. When this occurs, the examinee is denied the right to practice law for a reason (i.e. failing the examination) that does not have a "rational connection" with his fitness or capacity as a practitioner. The examinee's Substantive Due Process Rights are thereby trampled upon. Also he

is denied the Equal Protection of the law because others who took the exam were not subjected to the unlawful grading procedures thrust upon him by the examiner who deviated from professional norms and professional standards in grading procedures. The examinee has the right to have his examiner aware of whether the scores he is giving are passing scores or failing scores when there is an absolute pass/fail line on the exam, and no other sort of check such as scaling is employed.

Turning now to the facts of the case at bar, Petitioner, R. William Graham failed the July 1990 Ohio Bar Examination. As a result of failing the July 1990, bar examination, Petitioner was denied admission to practice law in the state of Ohio.

The purpose of the Ohio Bar Examination is to test minimum competency

(minimum proficiency) in certain examined areas of the law. The July 1990 Ohio Bar Examination set an absolute score to correspond with a showing of minimum competency to practice law. The absolute score that was set to represent the minumum competency of the material tested was 75 percent, which in July 1990, was 270 points out of a possible 360 points. (Each of the 24 essay questions was worth a maximum of 10 points and the Multistate Bar Examination was worth a maximum of 120 points.) The range an examiner could give on any individual essay answer was 0 to 10 points. Therefore, the score which reflected minimum competency on an indvidual essay answer would have been 7.5 points (75 percent of 10 points). <u>When there is an absolute score for an exam to correspond with minimum competency, the very validity of the examination results</u>

are dependant on the fact that each and every examiner adopts the same pass/fail percentage score (minimum competency score) on every answer he grades. Adoption of a uniform minimum competency score (in this case 7.5 points) by every examiner on each and every answer he grades **produces** the minimum competency score (in this case 75 percent) for the overall examination. It is important to say that again. Adopting the same minimum competency score on each and every answer that corresponds with the percentage minimum competency score set for the overall exam is what **produces** the minimum competency for the overall exam. The two are intrinsically related, and no shifting in either one can occur if valid test results are desired.

If an examiner has no knowledge of, and, hence, does not incorporate the 7.5

minumum competency score in the grading of his answers, then no matter what criteria is used to grade the answers, all the examiner's grades will be invalid because he did not use the pass/fail percentage score which was preset for the examination as the frame of reference for the grades he gave. No matter how diligently anyone critiques the answers he reads, his procedures will violate defined professional practices and standards in grading which are meant to insure fairness, reasonable discretion, and validity in test results. A properly graded examination is necessary to retain the rational connection between the test results of a bar applicant and the applicant's fitness or capacity to practice law.

In the case at bar, one examiner, Leslie W. Jacobs, testified under oath

that he used his "own" professional standard in grading, and did not know, adopt, or use the 7.5 minimum competency score in his grading system. All the following answers are those of examiner Leslie W. Jacobs, and are taken from pages 200 through 207 of the record the Trascript of Proceedings dated February 19 and 21, 1991, said testimony having been given under oath in the United States District Court for the Southern District of Ohio, Western Division.

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Q. Did you receive any instruction in how to grade the examination in connection with your service as a bar examiner?

A. No instruction other than to use the zero-to-ten scale and grade them in my best professional judgment.

Q. And did you understand that seven-to-ten scale that--

A. Zero-to-ten.

Q. I'm sorry, zero to ten, that 7.5 had been predetermind to be the score that corresponded with the minimum competency to practice law in Ohio?

A. No.

Q. What did you understand it to be?

A. I understood the rule to provide that an overall score of 75 percent of the composite grade was the level for passing the Ohio bar exam. I never understood and to this day do not understand that there is any concept of passing or failing an individual question...

Q. Well, what I meant to say is, your understanding with regard to the zero-to-ten figure you awarded, okay, if there is a 75 percent predetermined figure, wouldn't that translate to 7.5 on a zero-to-ten scale?

A. Someone could apply the math that

way. I did not understand the concept of the rule to create a pass or fail level for any individual question has ever been established anywhere.

Q. Insofar as your grading of the examination, that 7.5 played no part in terms of a pass or fail of the exam?

A. I was not seeking to determine whether any individual passed or failed the exam, that's correct.

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Q. Did you see, for example, in one of the papers that were filed on behalf of the Plaintiffs in this case that based on their calculations you had graded approximately 694 examinations in the July 1990 examination and that you had awarded a grade of 7.5 or better, or a combined 15 or better, to only 10 of the 694 individuals?

A. I do not recall that specific

statement.

Q. If I told you that, would that figure surprise you?

A. Not particularly one way or the other. I really don't know whether that would be high or low.

Clearly, Mr. Jacobs did not understand the minimum competency score for passing a particular question. In other words, he did not understand the scoring system set down for the examination. One needs knowledge of the score used to denote minimum competency in a particular answer because the bar examination is a test of minimum competency. As has already been stated, Dr. D'Costa, Ph.D (Educational Research and Measurement) testified in the Federal District Court related case that adoption by all examiners of the grade selected to demonstrate minimum competency is

"critical" to ensure valid test results.

The following are excerpts from the direct examination of Dr. D'Costa taken from the Transcript of Proceedings dated February 19 and 21, 1991 in the United States District Court for the Southern District of Ohio, Western Division.

Q. Dr. D'Costa, if I told you to assume that Mr. Jacobs received no training for the grading of the Ohio 1990 bar examination, would that be an important fact for you to know in giving an opinion as to whether or not he was able to be qualified to grade the examinations from that exam?...

THE WITNESS: If that were the case, Mr. Makley, I would indeed be horrified. I would expect the Board...to make sure that all the judges were functioning from the same level of standard-of-competency expectations.

Page 252

Q. Where you have a pre-set standard of pass/fail, such as we have here, 7.5, what, in your opinion, is the significance of having instruction given to the graders of the examination with reference to this realm of disagreement?

A. I think it is critical that examiners and graders be given this instruction... Also, the procedure of what is considered expected level of competence. And people differ on that. And the purpose of the training is... make sure that there is...concurrence on what that standard of passing ought to be.

Any contention that it is not necessary to know the pass/fail line for an individual question--only the pass/fail line for the overall exam--is not valid. This erroneous contention is based on the fact that the score you receive on an

individual question does not determine whether or not the examinee passes or fails the exam. While this is true, that one can fail any question but still pass the exam (or vice versa), the mark one recevies on each and every question is directly related (as opposed to indirectly related) to one's chances of passing the entire exam when there is a set total score predetermined to be the pass/fail line on the exam, that is to say, no curve factor enters into the pass/fail determination.

In other words, if one receives a lower score than should have been received on an individual answer because a grader does not know the minimum passing grade for the answers he is grading, and, therefore, does not (1) have the correct frame of reference from which to judge how far below the minimum pass line the answer

deserves to be graded, and/or (2) does not employ the same frame of reference for minimum competency that other examiners are using, then the examinee must score that much higher on other answers--to make up for the invalidly low score he was given--to reach the minimum competency score set for the entire exam.

So, one must follow the same minimum competency score that is set for the overall exam on each individual answer graded **in order to produce** the minimum competency score that has been set for the overall exam. Doing the former is intrinsically related to retaining the latter. Without knowing the former, we allow the possibilty that the pass/fail line will shift (because there is no set frame of reference) producing nonconformity in the minimum competency grade being used not only between the

individual exams graded by the examiner, but also between the exams graded by that examiner and those graded by other examiners who are aware of and are following the set frame of reference for minimum competency which was to be applied on each individual answer in order to produce the minimum competency score that had been set for the entire exam.

The bottom line is that all examiners must be aware of and follow the same minimum competency score on each answer he grades that corresponds with the percentage minimum competency score set for the overall exam in order to produce the minimum competency score that has been set for the overall exam. If any examiner does not adopt and follow the same minimum competency score on each answer he grades that corresponds with the the percentage minimum competency score set for the

overall exam, he is unilaterally changing the pass/fail grade set for the overall exam by his deviant grading procedure. We cannot allow a "fluctuating" minimum competency score. There is no way flucuation in the case at bar could not have taken place because uniformity is only ensured when all examiners adopt the same reference point as to the grade that reflects minimum competency.

The statistical results of Mr. Jacobs' grading procedure bear out the disparity and unfairness caused by him in not adopting the minimum competency score that was set for the overall exam on each individual answer he graded. Mr. Jacobs graded 694 examinees. He assigned passing grades to only 10 examinees, which amounts to passing only 1.4 percent of the students he graded. In other words, Mr. Jacobs concluded that 98.6 percent of the

students he graded have minimum competency. Let us compare the percentage of students passed by each of the examiners.

EXAMINER	No.GRD'D	No.PASSED	%PASSED
Gudorf	779	461	59.2
Campenella	779	344	44.2
Shah	786	765	97.3
Jacobs	694	10	1.4
Harris	796	573	72.0
James	694	632	91.1
Trafford	787	635	80.7
Travis	772	620	80.3
Gordon	787	606	77.0
DeLeone	786	448	57.0
Byers	796	328	41.2
McNamara	772	306	39.6

We see there is a 38.2 percent pass rate differential between Jacobs and the next closest examiner (McNamara). The next largest spread between examiners is 6.2 percent (between Shah and James). The comparision is shocking and begs for an explanation. What could account for such

great disparity in the percentage pass rate between Jacobs and the other 11 examiners? Mr. Jacobs did not apply the minimum competency standards for the overall exam to the individual answers he graded. By his actions, Mr. Jacobs caused the highest failure rate for the Ohio bar exam in 20 years.

The Constitution of the United States does not require a perfect bar exam, nor does it require perfect bar examiners. See Re Reardon, supra. It does require though a fair and validly administered bar examination in order to retain the rational connection between the results of the bar exam and one's fitness or capacity to practice law. Mr. Jacobs admitted he did not adhere to the minimum competency score of 7.5 in grading his answers. This was a "substantial departure from accepted academic norms". See Regents of the

University of Michigan, supra. It amounted to a substantial departure from accepted professional practice and accepted professional standards. See Youngberg, supra. These are guidelines set down by the United States Court of Appeals for the Third and Sixth Circuts. Mr. Jacobs' grading procedure plainly resulted in gross grading errors.

These grading errors "broke the rational connection" between the qualification--passing the bar examination--and Petitioner's fitness or capacity to practice law. See Schware, supra. Hence, no valid reason existed to preclude Petitioner from being admitted to the bar and practicing law in the state of Ohio. Respondents denied Petitioner his Substantive Due Process and Equal Protection Rights under the United States Constitution when they determined

Petitioner was not fit to practice law in the state of Ohio.

A Procedural Due Process challange is also raised due to the fact that Petitioner was never given access to the Model Answers (prepared by examiner Jacobs) of the questions Mr. Jacobs graded. In the Transcript of Proceedings in Federal District Court dated February 19 and 21, 1991, and page 197, Mr. Jacobs made the following answers to the following questions on cross examination:

Q. What happened to the model answer you prepared for the July 1990 examinamtion?

A. I honestly don't know. I really don't recall whether I submitted that to the Clerk's office or not.

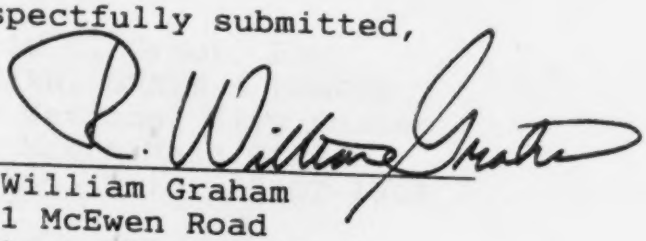
Q. So as you sit there today, you are not sure where it is?

A. I am not sure.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment of the Ohio Court which found no violation of Petitioner's Due Process or Equal Protection rights.

Respectfully submitted,



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Pro se.
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V. CERTIFICATE OF SERVICE

A copy of the foregoing **Petition For Writ of Certiorari** was mailed via regular first class U.S. mail on this 20th day of July, 1995, to the Attorneys of Defendants-Appellees:

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Alicia M. Hamman
Alicia M. Hamman

APPENDIX A

THE SUPREME COURT OF OHIO
1995 TERM
To wit: April 25, 1995

R. William Graham Appellant,	:	Case No. 94-2197
v.	:	
The Ohio Board of Bar Examiners et al., Appellees.	:	ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case.

COSTS:

Docket Fee, $40.00, paid by R. William Graham.
(Franklin County Court of Appeals; No. 94API03377)

CHARLES R. PETREE
Acting Chief Justice

APPENDIX B

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

R. WILLIAM GRAHAM PLAINTIFF-APPELLANT	:
v.	: No. 94API03-377
THE OHIO BOARD OF BAR EXAMINERS et.al., DEFENDANTS-APPELLEES	:REGULAR CALENDAR

JOURNAL OF ENTRY OF JUDGMENT

For reasons stated in the opinion of this court rendered herein on September 15, 1994, it is the judgment of this court that the judgment of the Court of Claims of Ohio is affirmed.

BRYANT, CLOSE and McCORMAC, JJ.

By _____
JUDGE PEGGY BRYANT

McCORMAC, J., retired, of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

R. William Graham :
Plaintiff-Appellant : No.94API03-377

v. :REGULAR CALENDAR

The Ohio Board of Bar Examiners et al., :
Defendants-Appellees:

O P I N I O N
Rendered on September 15, 1994

R. William Graham, pro se.
Lee Fisher, Attorney General, Loren L. Braverman; Beiser, Greer, & Landis, and David C. Greer, for appellees.

APPEAL from the Ohio Court of Claims.

BRYANT, J.

Plaintiff-appellant, R. William Graham, appeals from a judgment of the Ohio Court of Claims granting the motion to dismiss of defendants-appellees, the Ohio Supreme Court and the Board of Bar Examiners.

In July 1990, plaintiff unsuccessfully sat for the July 1990 Ohio bar examination, and was thus denied admission to practice law in the state of Ohio. Although plaintiff filed actions in the United States District Court for the Southern District of Ohio, Western Division and in the Ohio Supreme Court to challenge the process employed in administering the July 1990 bar examination, plaintiff also commenced an action in the Ohio Court of Claims, seeking damages, as well as declaratory and injunctive relief, for violations of

his due process rights under the Ohio Constitution and the United States Constitution as set forth in Sections 1983 and 1985, Title 42, U.S. Code. As in plaintiff's other litigation arising out of the bar examination, plaintiff's claims focused on the score's given by one member of the Ohio Board of Examiners: plaintiff asserted that defendants negligently prepared and instructed that member of the board, who arbitrarily and capriciously denied palintiff his due process rights, resulting in plaintiff's unsuccessful attempt to pass the bar examination.

Although plaintiff's complaint was filed against Marcia Mengel, Clerk of the Supreme Court of Ohio in her capacity as clerk and as secretary to the Board of Bar Examiners, the Justices of the Ohio Supreme Court, individually and in their official capacities,and the members of the

Ohio Board of Bar Examiners, individually and in their official capacities, the trial court by pre-screening entry dated May 14, 1992, noted that under R.C. 4723.02(E) only state agencies and instrumentalities can be defendants in original actions in the Court of Claims. Thus, the trial court dismissed all parties except the Ohio Supreme Court and the Board of Bar Examiners. While the present litigation was stayed pending resolution of the various other actions plaintiff commenced, the stay was lifted on August 6, 1993; the following month defendants filed a motion to dismiss, which the trial court converted to a summary judgment motion.

Following full briefing, the trial court granted defendants' summary judgment motion, finding that it lacked jurisdiction to consider plaintiff's

claims under Sections 1983 and 1985, Title 42, U.S. Code; that defendants' actions were protected by judicial immunity; and that plaintiff failed to set forth evidence that defendants' negligence proximately caused plaintiff's damages. Plaintiff appeals, assigning the following errors:

> "I. THE COURT OF CLAIMS COMMITTED AN ERROR AS A MATTER OF LAW IN HOLDING THAT STATE OFFICERS ARE NOT 'PERSONS' FOR PURPOSES OF SECTIONS 1983 AND 1985 OF TITLE 42.
> "II. THE COURT OF CLAIMS COMMITTED AN ERROR AS A MATTER OF LAW IN HOLDING THAT ANY AND ALL OFFICERS OF THE STATE WHOSE DUTY IT IS UNDER LAW TO SERVE THE PROCESS OF THE COURT ARE IMMUNE UNDER THE DOCTRINE OF JUDICIAL IMMUNITY.
> "III. THE COURT OF CLAIMS COMMITTED AN ERROR AS A MATTER OF LAW AND FACT IN ITS FINDING THAT THERE WAS NO NEGLIGENCE ON THE PART OF THE SUPREME COURT OF

OHIO OR ITS AGENTS IN ITS DECISION NOT TO INSTRUCT EXAMINER JACOBS ON THE BASIS THAT IT WAS DISCRETIONARY FOR THE PURPOSE OF ENSURING THAT SUCH EXAMINER APPROACH THE GRADING WITH HIS OWN JUDGMENT, AND IS MANIFESTLY AGAINST THE WEIGHT OF THE EVIDENCE."

Plaintiff's first assignment of error asserts that the trial court erred in finding that it lacked jurisdiction over plaintiff's contentions under Sections 1983 and 1985, Title 42, U.S. Code.

Pursuant to R.C. 2743.02(E), only the state is a proper defendant in the Court of Claims; individul officers are not. Further, the state is not a "person" within the meaning of Sections 1983 nd 1985, Title 42, U.S. Code. Thus, an action under those sections may not be maintained in the Court of Claims against the state. Burkey v. Southern Ohio

Correctional Facility (1988), 38 Ohio App.3d 170,171. The trial court properly detremined that it lacked jurisdiction to hear plaintiff's claims under Section 1983 and 1985, Title 42, U.S. Code.

Further, while plaintiff assserts that defendants were negligent in performing their responsiblities regarding the July 1990 bar examination, he in reality contends that defendants negligently violated his rights to due process under the Ohio Constitution and the Fourteenth Amendment to the United States Constitution. Because the state is liable in the Court of Claims "in accordance with the same rules of law applicable to suits between private parties," R.C. 2743.02(A)(1), plaintiff's contitutional claims present no viable cause of action to be heard in the Court of Claims. Thompson v. Southern State

Community College (june 15,1989), Franklin App. No. 89AP-114, unreported (1989 Opinions 2118). Thus, plaintiff's contentions fall outside the jurisdiction of the Court of Claims.

Plaintiff's first assignment of error is overrulled.

Plaintiff's second assignment of error asserts that the trial court erred in concluding that defendants are immune from liability under the doctrine of judicial immunity.

In the litigation plaintiff commenced in the United States District court for the Southern District of Ohio, Western Divsion, the trial court therein was required to decide "whether the decisions to deny [plaintiff] admission to the bar based upon [his] grades in the bar examination were judicial decisions made in judicial proceedings." Finding tht

they were, the district court determined that it lacked jurisdiction under D.C. Court of Apeals v. Feldman (1983), 460 U.S. 462, to hear plaintiff's claim against the Board of Bar Examiners and the Ohio Supreme Court, among others.

While the specific holding of Feldman is not dispositive here, the district court's determination that the decision to deny plaintiff's admission was a decision made in judicial proceeding is relevant. Sparks v. Character and Fitness Committee of Ky. (C.A.6,1988),859 F.2d 428, certioari denied (1988), 489 U.S. 1011 (the state bar is so inherently related to teh essential functioning of the courts that it must be a judicial function, even if the actor was a designee of the justices of the Supreme Court rather that the justices themselves). See also, Hampton v. Tennessee Bd. of Law Examiners

(1989), 770 S.W.2d 755,757. Defendants, acting in a judicial proceeding, are immune from suit under the doctrine of judicial immunity. Plaintiff's second assignment of error is overruled.

Plaintiff's third assignment of error contends that the trial court's determination that defendants are not liable under allegations of plaintiff's complaint.

While judicial immunity insulates defendants from liability for damages in the present action, it does not protect defendants from appropriate injunctive relief. Given the nature of plaintiff's complaint, however, we are unclear whether plaintiff seeks mandatory injunction against defendants, or rather a writ of mandamus compelling defendants to take certain action concernig plaintiff's bar examination and application for admission

to the bar of Ohio. While the Court of Claims has jurisdiction of an action to request a mandatory injunctive releif, it lacks original jurisdiction to issue a writ of mandamus. Nonetheless, even if we construe plaintiff's complaint to request mandatory injunction against defendants, plaintiff's complaint fails to raise a genuine issue of material fact as to defendants' liability.

As the parties agreed in the district court litigation, to demonstrate a violation of his constitutional right to due process, plaintiff must set forth evidence creating a genuine issue of material fact that defendants failed to exercise professional judgment. See Regents of Univ. of Michigan v. Ewing (1985), 474 U.S. 214,225. Indeed, in addressing that aspect of plaintiff's contentions, the district noted that it

"has found that the [single bar examiner at issue] exercised professional judgment in the method by which he graded the examinations. ***[W}ere this Court to reach the merits,it would be called upon to determine whether the July 1990, bar examination, taken as a whole, was such a substantial departure from accepted norms that it demonstrates that professional judgment was not exercised and, consequently, that the examination was not related to the the [plaintiff's] fitness to practice law." (Decision p.22-23.)

In arguing that a genuine issue of material fact exists, plaintiff relies heavily on the district court determination that the bar examiner at issue "did not grade the exam in conformity in any standards set by the Ohio Supreme Court. Indeed, [bar examiner] testified that there was no

attempt by the Ohio Supreme Court to have the 12 examiners apply standard criteria when grading the exam. [He] testified that the exam was graded by 12 individuals, each exercising his or her own best independent professional judgement. Additionally, he testified that he did not understand that a score of 7.5 on an answer corresponded with minimum competency." (Finding of Fact No. 11)

Even if we construe the foregoing in favor of plaintiff, we are unable to conclude that plaintiff has demonstrated a genuine issue of material fact concerning violation of his due process rights. While the district court's findings may suggest that defendants could have better instructed the individual bar examiners regarding a uniform approach to grading the bar examination essays, the evidence

fails to support plaintiff's contentions that defendants' failure to so instruct is tantamount to a lack of professional judgment and renders the examination results unrelated to plaintiff's ability to practice law, especially given the finding that the individual examiner plaintiff contends to be at fault was found to have exercised his professional judgment.

Given the foregoing, plaintiff's third assignment of error is overruled.

Having overruled all three assignements of error, we affirm the judgment of the trial court.

Judgment affirmed

CLOSE and McCORMAC, JJ., concur

McCormac, J., retired, of the Tenth Appellate District assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

APPENDIX C

IN THE COURT OF CLAIMS OF OHIO

R. WILLIAM GRAHAM Plaintiff	:	
v.	:	CASE NO.92-05187
OHIO BOARD OF BAR EXAMINERS, et al.,	:	DECISION Judge Russell Leach
Defendants	:	

: : : : :

This cause is before the court upon defendants' motion for summary judgment.

R. William Graham, plaintiff herein, sought admission to practice law in the State of Ohio. The Supreme Court of Ohio, defendant herein, regulates admission to the Ohio Bar and has established an examination for the purpose of evaluating applicants. Having met various other requirements, plaintiff was permitted to take the July 1990 bar examination. His scores, as tallied by defendant, Ohio Board of Bar Examiners (board), were

deemed insufficient, and he was denied admission to the bar.

On May 8, 1992, plaintiff filed a complaint in this court against the Clerk of the Supreme Court, in her capacities as Clerk and Secretary of the Board; each Justice of the Supreme Court, individually and in their official capacities; and each member of the board, individually and in their official capacities. Plaintiff asserted in his complaint, through a number of theories to be considered individually below, that he should have received a passing score on the bar exam, but that he did not because of the failure of defendants to properly administer the bar exam.

By pre-screening entry of May 14, 1992, this court dismissed all named individuals from this action pursuant to R.C. 2743.02. The Supreme Court and the

Board remain as defendants.

On June 15, 1992, this cause was stayed pending resolution of other causes of action filed by plaintiff in the Supreme Court and the Southern Distrrict Court for the Southern District of Ohio. These matters having been resolved, the stay was vacated on August 6, 1993.

On September 8, 1993, defendants filed a motion to dismiss pursuant to Civ. R. 12(B)(6), or in the alternative, a motion for summary judgment pursuant to Civ. R. 56. On September 28, 1993, the court deemed the entire motion as one for summary judgement. A non-oral hearing was held on October 8, 1993.

I

Plaintiff has asserted that various acts or omissions of defendants violated his rights to equal protection and due process under both the state and federal

constitutions. Plaintiff also contends that defendants' conduct was in violaton of Sections 1983 and 1985, Title 42, U.S. Code.

Claims predicated upon Sections 1983 and1985 of Title 42 cannot be maintained against the state in the Court of Claims, since the state is not a "person" for the purposes of these statutes. See, e.g., will v. Michigan Dept of State Police (1989), 491 U.S. 58; Burkey v. Southern Ohio Correctional Facility (1988), 38 Ohio St. 3d 170; Kinney v. Ohio Dept. of Admin. Serv. (1986), 30 Ohio App. 3d 121. Similarly, equal protection and due process claims, whether predicated upon federal or state constitutions, are not maintainable in the Court of Claims. See, e.g., The Upjohn Co. v. Ohio Department of Human Services (April 9, 1990), Court of Claims No. 89-002211, unreported, at p.8-

10; affirmed on other grounds, (1991), 77 Ohio App. 3d 827. Judgment is, therefore, rendered in favor of defendants on these claims, as a matter of law.

II

Defendants assert that the alleged acts or omissions upon which liability is asserted asre not actionable pursuant to the doctrine of judicial immunity, citing Kelly v. Whiting (1985), 17 Ohio St. 3d 91. An excellent statement of the doctrine of immunity was set forth in Voll v. Steele (1943), 141 Ohio St. 253, at 301, as follows:

> The prinicple is well settled, both by authority and by reason, that no civil action can be maintained against a judicial officer for recovery of damages by one claiming to have been injured by his judicial action within his juristiction. From the very nature of the case, the officer is called upon, by law,

> to exercise his judgment in all matters before him, and the law holds his duty to the individual to have been performed when he has exercised it. Such protection is essential to the honest and independant administration of justice, and is based on sound public policy.

More recently, it has been concluded that: "the purpose of the doctrine is to preserve the integrity and independence of the judiciary and to insure that judges will act upon their convictions free from the apprehensions of possible consequences." Wilson v. Neu (1984), 12 Ohio St. 3d 102, 103. Furthermore, "[a] substantial majority of jurisdictions recognize the rule that where a judge possess jurisdiction over the controversy, he is not civilly liable for acts done in the exercise of his judicial function. Id. See, also, cases collected as id., fn. 1.

All Ohio decisions that have considered the issue of judicial immunity have upheld its viability and application. See, e.g., Truesdell v. Combs (1877), 33 Ohio St. 186, 193-194; Brinkman v. Drolesbaugh (19810, 97 Ohio St. 171, paragraph five of syllabus; Stahl v. Curry (1939), 135 Ohio St. 253, 260-261; Voll v. Steele, supra; Wilson v. Neu, supra; Kelly v. Wilson, supra. Also, "the state cannot be sued for its *** judiial functions" under the Court of Claims Act. Reynolds v. State (1984), 14 Ohio St. 3d 68, at paragraph 1 of the syllabus. (Emphasis added.)

Similarly, it has been held that judicial immunity extends to those appointed by the court to carry out its judicial directives. In Brinkman, supra, at paragraph six of the syllabus, immunity is imparted to every "authorized officer of the state, whose duty it is under the

law to serve the process of such court." That case applied judicial immunity to police officers judicially authorized to serve certain processes upon named individuals. Plainly, the underlying rationale applies with equal force to those appointed by the court to carry out the administration of particular tasks, such as the office of Clerk of the Supreme Court and the Supreme Court Board of Bar Examiners.

Having concluded that defendants may be immune for their judicial acts, done within the jurisdiction of the Court, it remains to inquire whether the examination of applicants to the practice of law is, in Ohio, a judicial act. Upon this issue, Ohio Courts have long held that the examiation and admission of applicants is exclusively a judicial function.

The order of admission is the

> judgment of the court that the party possesses the requisite qualifications as attorneys and is entitled to appear as such and conduct cases therein. From its entry the parties become officers of the court and are responsible to it for professional misconduct. They hold their office through good behavior and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after an opportunity to be heard. Their admission or exclusion is not the exercise of mere ministerial power. It is the exercise of judicial power. (Emphasis added).

In re Thatcher (1912), 22 Ohio Decisions 116, 127 (lucas Common Pleas), quoting with approval Garland, Ex Parte, 71 U.S. 378.

More precisely, the Ohio Constitution provides in Art. IV, Section 2(B)(1)(g) that Ohio Supreme Court shall have

"original jurisdiction" over "[a]dmission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law." Since admission to the practice of law is a matter commmitted to the jurisdiction of the court, and that by the constitution, the examination of bar applicants is also a matter within the court's jurisdiction, and is, furthermore, quite necessary to distinguish those with sufficient qualifications to practice law. Therefore, this court conludes that the process utilized by defendants for the examination of bar applicants constitutes a judicial act for all purposes of judicial immunity. Moreover, the court concludes that defendants are immune pursuant to the doctrine of judicial immunity for those acts complained of by plaintiff.

Plaintiff has asserted that defendants have waived all immunity by decision in Reynolds v. State (1984), 14 Ohio St. 3d 68. However, in Reynolds, the court pronounced upon the abrogation of sovreign immunity, not judicial immunity. Judicial immunity, like the public duty rule, "is a doctrine which is independent of, and accordingly survived the abrogation of, sovereign immunity." Sawicki v. Ottawa Hills (1988), 37 Ohio St. 3d 222, at paragraph 3 of the syllabus. Cosequently, the rule of judicial immunity remains unaffected by the state's abrogation of its sovereign perogatives.

III

Upon review of the acts or omissions complained of, the court additionally determines that defendants did not act negligently and that defendants' acts or

omissions did not proximately cause plaintiff's harms. As explained by plaintiff, the July 1990 bar exam required all applicants to submit to a grueling three days of written tests. Each applicant was required to score two hundred and seventy points out of a possible three hundred and sixty points in order to be admitted to the practice of law.

So as to more quickly evaluate the twenty-four essays submitted by each of more that 1,300 bar applicants, the bar examiners employed a presumptive pass rule. This rule allowed a presumption of a passing score to each applicant whose score on the Multi-state Bar Exam (MBE) was in the upper 60 percent of all Ohio applicants and whose four sampled essay answers averaged 7.5 points out of a possible ten points. Those applicants who

either scored in the lower forty percent of the MBE or whose sampled essays did not average 7.5 points were subjected to the full, formal grading process.

Plaintiff asserts that he should have passed the examination pursuant to the presumptive pass rule, and would have but for the low grades given by a particular bar examiner. Additionally, plaintiff contends that the bar examiner gave low grades because he was not formally instructed that a grade of 7.5 points per essay answer constituted "minimal competence" to practice law.

It is apparent that the presumptive pass rule was merely an internal device for the quicker analysis of plaintiff's exam answers. The process allowing a presumption of a passing score did not, however, result in a failing score for plaintiff or any other bar applicant.

Instead, the failure to qualify for a presumption only resulted in all of plaintiff's exam answers being thoroughly evaluated and graded. This more thorough review served the additional purpose of informing such applicants of the precise weaknesses in their test performances. While the presumptive pass rule certainly served to focus the energies of the bar examiners more closely upon certain applicants, it was plaintiff's total performance that determined whether he passed or failed. Plaintiff submitted his entire test results for defendants evaluation and cannot now be heard to complain that all of his test results were actually analyzed and graded.

Plaintiff contends that defendants should have informed all bar examiners that a score of 7.5 points out of ten on each essay answer cnstituted "minimal

competence." Plaintiff fails to explain how this would have changed his test results. Also, nothing submitted indicates that the bar examiner gave low scores out of a mistaken understanding, or that, given some additional understanding or presumption, he would have given higher grades to plaintiff. Instead, it is admitted that the examiner understood that he could give scores ranging from zero to ten points for each test answer. Without more, it may be presumed that whatever criteria that bar examiner utilized in grading plaintiff's examinations was an accurate reflection of that examiner's view of the quality of plaintiff's answers.

Moreover, it appears that bar examiners were not instructed upon how they were to evaluate answers. This was not, however, because of the negligence of

the Supreme Court, but rather, a discretionary decision, done for the purpose of ensuring that each bar examiner approached the grading process with their own best pofessional judgment of which applicants met the intellectual requirements for admission to the practice of law. Similarly, there is no allegation that the bar examiner acted negligently in giving uniformly low scores. Instead, it would appear that he did so as a zealous exercise of his professional judgment.

IV

Because of the conclusions on the above considered issues, the court need not address the claimed application of the public duty rule or whether res judicata might bar the relitigation of certain matters, both of which issues were raised by defendants.

For all the above reasons, this court finds that defendants are entitled to summary judgment.

RUSSELL LEACH
Judge

APPENDIX D

IN THE COURT OF CLAIMS OF OHIO

R. WILLIAM GRAHAM Plaintiff	: :CASE NO. 9205187
v.	:
OHIO BOARD OF BAR EXAMINERS et al., Defendants	:JUDGMENT :GRANTING :DEFENDANTS' :MOTION FOR :SUMMARY JUDGMENT
	:Judge Russell :Leach

: : : : : : :

The court has considered the evidence and rendered a decision filed herein. Defendants' motion for summary judgment is hereby GRANTED. Judgment is rendered in favor of defendants and against plaintiff. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its

date of entry upon the journal.

RUSSELL LEACH
Judge

Entry cc:

R.William Graham	Pro se
Loren L. Braverman	Attorney for Defendant
David C. Greer	Special Counsel for Defendant

APPENDIX E

THE SUPREME COURT OF OHIO

1993 Term

To wit: July 14, 1992

R. William Graham, Plaintiff,	:	Case No. 92-566
v.	:	E N T R Y
Marcia Mengel, Clerk of the Supreme Court of Ohio, etc., et al.	:	

This cause originated in this Court on the filing of a complaint for damages, declaratory and injunctive relief and was considered in a manner prescribed by law.

IT IS ORDERED by the Court, sua sponte, that this cause be, and hereby is, dismissed for want of jurisdiction.

THOMAS J. MOYER
Chief Justice

APPENDIX F

THE SUPREME COURT OF OHIO

1992 Term

To wit: April, 15, 1992

R. William Graham, Plaintiff,	:	Case No. 92-566
v.	:	
	:	**IN MANDAMUS**
Marcia Mengel et al., Defendants.	:	E N T R Y

This cause originated in this Court on the filing of a complaint for damages, declaratory and injunctive relief. Upon consideration of plaintiff's requests for appointment of noninterested judges,

IT IS ORDERED by the Court that said request for appointment of noninterested judges be, and the same is hereby denied.

THOMAS J. MOYER
Chief Justice

APPENDIX G

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 21, 1993

Mr. R. William Graham
15 W. Dorothy Lane
Suite 202
Kettering, OH 45429

RE: R. William Graham
v. Marcia J. Mengel, Clerk,
Supreme Court of Ohio and
Secretary, Ohio Board of Bar
Examiners, et al.

Case No. 92-1778

Dear Mr. Graham:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

William K. Suter, Clerk

APPENDIX H

No. 92-3283

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

R. WILLIAM GRAHAM, Plaintiff-Appellant, MICHAEL DEFFET; DANIEL D. CAREY, Plaintiffs, v. MARCIA J. MENGAL, Clerk of Supreme Court of Ohio and Secretary of the Ohio Board of Examiners, et al., Defendants-Appellees.	)	ORDER

BEFORE: BOGGS and SILER, Circuit Judges, and JOINER, Senior District Judge[1] .

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[1] The Honorable Charles W. Joiner, Senior U.S. District Judge for the Eastern District of Michigan, sitting by designation.

R. William Graham, a pro se Ohio resident, appeals a district court judgment dismissing his civil rights complaint filed under 42 U.S.C. §§ 1983 and 1985. The case has been referred to a panel of the pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking injunctive, declaratory, and monetary relief, Graham and tow other individuals sued the clerk of the Ohio Supreme Court, the Justices of the Ohio Supreme Court and the members of the Ohio Board of Bar Examiners in their individual and official capacities for allegedly violating plaintiffs' due process and equal protection rights under the Fourteenth Amendment. Plaintiffs, who unsuccessfully sat for the July 1990 Ohio bar examination, claimed that the manner in which the examination was graded was arbitrary and capricious, resulting in the denial of their constitutional rights.

The district court granted defendants' motion for summary judgment as to plaintiffs' claims of procedural due process and equal protection; however, it tried the issue as to whether plaintiffs were denied substantive due process. After trial, the district court concluded that it lacked subject matter jurisdiction over the dispute and dismissed the case.

In his timely appeal, Graham essentially argues that the district court erred by concluding that it lacked subject matter jurisdiction. Graham is the only plaintiff to file a timely appeal.

Upon de novo review, we conclude that the district court was without jurisdiction to entertain Graham's complaint. See D.C. Court of Appeals V. Feldman, 460 U.S. 462, 485-86 (1983).

Accordingly, the judgment of the district court is hereby affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

R. WILLIAM GRAHAM, et al.,	:
Plaintiffs,	:
v.	:Case No. C3-90-413
MARCIA J. MENGEL, et al.,	:Judge Rice
Defendants.	:

FINDINGS OF FACT AND CONCLUSIONS OF LAW; DECISION AND ENTRY OVERRULING DEFENDANTS' MOTION TO DISMISS FOR MOOTNESS THE CLAIMS OF DEFFET AND CAREY (DOC. #34); DECISION AND ENTRY SUSTAINING DEFENDANTS' MOTION TO DISMISS (DOC.#38); JUDGMENT TO BE ENTERED IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFFS, DISMISSING PLAINTIFFS' SECOND AMENDED COMPLAINT (DOC. #24) FOR WANT OF SUBJECT MATTER JURISDICTION; TERMINATION ENTRY

The Plaintiffs, three examinees who successfully sat for the July, 1990 Ohio bar examination was graded arbitrary and capricious and denied them substantive due

process, i.e. deprivation of a liberty/property interest, as guaranteed by the Fourteenth Amendment to the United States Constitution.[1] In particular, Plaintiffs claims centered on the scores assigned to examinees by one member of the Ohio Board of Bar Examiners, Leslie Jacobs. Plaintiffs sought declaratory and injunctive relief. On February 19 and 21, 1991, this case was tried to the Court, without the intervention of a jury. Pursuant to Rule 52 and based upon the evidence adduced at the hearing of this matter and the arguments contained in parties post-trial submissions, the Court now states its Finding of Fact and its Conclusions of Law.

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[1] Plaintiffs also alleged that they were denied procedural due process and their right to equal protection of the laws. However, prior to the trial of this case, the Court sustained judgment (Doc. #13). See Docs. ##29 and 30. The Court sustained Defendants' motion with respect to Plaintiffs' claims of deprivation of procedural due process and denial of their right to equal protection of the laws. Consequently, this case went to trial only on Plaintiffs' claims that they were denied substantive due process. i.e. deprivation of a liberty/property interest.

I. FINDINGS OF FACT.

1. The Plaintiffs, R. William Graham ("Graham"), Michael E. Deffet ("Deffet") and Daniel D. Carey ("Carey"), failed the July, 1990, Ohio bar examination. As a result of failing the July, 1990, bar examination, Plaintiffs were denied admission to practice

law in the state of Ohio.[3]

2. The Defendants are the Clerk of the Ohio Supreme Court, the Chief Justice and Justices of the Ohio Supreme Court and the members of the Ohio Board of Bar Examiners ("Board"). The Supreme Court created the Board and

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[3] Deffet and Carey passed the passed the February, 1991, Ohio bar examination and were admitted to the practice of law in Ohio on May 20, 1991. Consequently, Defendants have filed a motion to dismiss the claims of Deffet and Carey, arguing that their admission to the bar renders their claims moot. See Doc. #34. Without question, their admission to the bar moots certain of remedies sought by Deffet and Carey. For instance, their request that the Court order them admitted to the bar is mooted. Nevertheless, the Court overrules Defendants' motion to dismiss (Doc. #34) in which they argue that all claims of Deffet and Carey are moot. The remedies sought by the two are more extensive than merely seeking to have the Court order their admission to the bar. For instance, Deffet and Carey argue in their memorandum in opposition (Doc. #37) to the motion to dismiss, that if this Court finds in their favor, it can order the records regarding their results on the July, 1990, bar examination sealed. Although they did not specifically request that relief in their second amended complaint, it could be an appropriate form of equitable relief under their prayer for "such other equitable relief to which they may be entitled." Therefore, this case remains a live controversy as to Deffet and Carey. It certainly remains a live controversy as to the Plaintiff Graham who has not retaken the Ohio bar examination.

delegated to it the task of assessing, by conducting the Ohio bar examination, the minimum competency of applicants to practice law in Ohio.[4] During July, 1990, there were 12 members of the Board. The clerk of the Supreme Court serves as the Secretary of the board.

3. The Ohio bar examination is conducted over a three day period. The first and third days of the examination consist of 24 essay questions prepared by the members of the Board. Each of the 12 members of the Board prepares and grades two essay questions which are given during a one hour period. Each set of two essays is answered in one essay booklet. The second day of the examination is devoted to the Multistate Bar Examination

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[4]The Ohio Constitution provides that the Ohio Supreme Court shall have original jurisdiction over admission to to the practice of law. Art. IV, S 2(B) (1) (g).

("MBE").[5] In order to pass the Ohio bar examination, an applicant must receive a score of 75% which, in July, 1990, was 270 out of a possible 360 points.[6]

4. In July, 1990, there were two methods by which an applicant could achieve this passing score. Under the first method, an Applicant could secure a passing score through the presumptive pass rule. Under this rule, an applicant achieves a passing score if he or she is the upper 60 percentile on the MBE and he or she receives 14 points on each of two randomly selected essay booklets.[7] The second mode of achieving a passing score is for applicants who do not achieve a passing score

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[5]The MBE is an objective six hour test consisting of 200 multiple choice questions. The MBE is prepared by the National Conference of Bar Examiners in conjunction with the American College Testing Program.

[6] Each of the 24 essay questions is worth a maximum of 10 points and the MBE is worth a maximum of 120 points.

[7]For purposes of this random selection, members of the Board are paired. Thus, each set of two bar examiners grades the same one-sixth of the examinees.

under the presumptive pass rule, i.e., those who scored in the lower 40 percentile of the MBE, did not score at least 14 on their two randomly selected essay books. To achieve a passing score, under the second mode, the total of the scores of all of an applicant's essay questions, together with his or her weighted MBE score, must equal or exceed 270 points.

5. Twelve hundred and nine examinees took the July, 1990, Ohio bar examination. Of those who took the bar examination, 419 or 35.1% were unsuccessful. As a result, the July, 1990, Ohio bar examination had one of the lowest pass rates in recent history.

6. The plaintiffs all scored in the upper 60 percentile of the MBE but failed to achieve passing scores on bar examination, because none received at least 14 points on his two randomly selected essay books and because the total of each plaintiff's scores on all his essay questions and his weighted MBE scores did not equal or exceed 270 points.

For each Plaintiff, one of two randomly selected essay books contained his answers to the questions of one particular member of the Board, Leslie Jacobs ("Jacobs").

7. Jacobs was easily the most stringent grader among the members of the Board. For instance, the other eleven members of the Board assigned an average score of slightly more than 15 points (15.134), out of a possible 20 points, to each essay booklet. Jacobs assigned and average score of just in excess of 10 points (10.043) per exam booklet. Additionally, approximately 720 applicants scored in the top 60 percentile of the MBE. Five hundred and twenty-eight of those passed under the presumptive pass rule. Jacobs and the examiner with whom he was paired graded the essay booklets, containing answers to the questions they gave, of 120 of those who scored in the top 60 percentile. Of those 120 examinees, only 13 passed under the presumptive pass rule, i.e., received a grade of 13 or more on each of the two sets of essay questions.

Finally, of the 694 examinees whose essay questions Jacobs graded, only 10 received 15 or more points.

8. Jacobs testified during the trial of this case and explained the manner in which he graded questions. Jacobs started with a model answer which he had drafted. Based upon the model answer, he then scored each question between zero and ten, with zero being given for a nonexistent answer and ten being given to the ideal. Jacobs testified that a manner of factors went the grade he assigned for each question.[8] First, he considered whether the examinee recognized the field of law which was being examined. Second, he considered whether the examinee has recognized the Hornbook legal principles which applied to fact pattern set forth in the question. Jacobs' third criterion was whether the examinee was able to analyze the facts in light of the legal principles, in other words to determine to

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[8] Jacobs testified that each factor was equal importance.

what extent those principles applied or did not apply to the particular facts.[9] Fourth, he considered the manner in which an answer was written, including grammar and spelling. Fifth, he considered whether the answer contained any affirmatively incorrect statements.[10] Finally, he considered whether anything was said which reflected an error regarding the Code of Professional Responsibility and the Code of Judicial Conduct. Jacobs testified that to the best of his ability he applied these criteria consistently to all questions.

9. When asked to explain why he thought that the grades which he assigned were so much lower than those assigned by his fellow bar

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[9] In assessing the ability of an examinee to analyze the facts and to apply legal principles, Jacobs testified that he was particularly interested in whether the answer followed a logical sequence. In other words, Jacobs considered whether the conclusion in a particular answer was consistent with the discussion.

[10] Jacobs deducted points for incorrect statements.

examiners, Jacobs explained that he deducted for incorrect statements, that one of his questions had a clear need to apply a principle of the Code of Judicial Conduct and that he viewed it very severely when an answer misapplied it, and that he considered not just the content of answers but also the way in which answers were written.

10. Based upon his testimony, the court finds that Jacobs exercised professional judgment in the manner in which he graded the July, 1990, bar examination.

11. Even though he exercised professional judgment in grading the July, 1990, bar examination, Jacobs did not grade the exam in conformity with any standards set by the Ohio Supreme Court.

Indeed, Jacobs testified that there was no attempt to by the Ohio Supreme Court to have the 12 examiners apply standard criteria when grading the exam. Jacobs testified that the exam was graded by 12 individuals, each exercising his or her own best, independent

professional judgment. Additionally, he testified that he did not understand that a score of 7.5 on an answer corresponded with minimum competency.

12. The decision to deny Plaintiffs admission to the bar, based upon the scores which they received on the bar examination, was made in a judicial proceeding within the meaning of D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983).

II OPINION.

After the trial of this case, Defendants filed a motion to dismiss (DOC. #38) which raises the question of this Court's subject matter jurisdiction to entertain the present case.[11]

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[11] This motion to dismiss (DOC. #38) is denominated Defendants' Supplemental Memorandum. However, it raises questions relating to this court subject matter jurisdiction over this case; therfore, the Court treats the supplemental memorandum as one to dismiss for want of subject matter jurisdiction.

It is axiomatic that subject matter jurisdiction goes to the very power of a court to hear a case. Subject matter jurisdiction cannot be waived and can be raised at any time, even on appeal. 5A Wright & Miller, Federal Practice and Procedure, § 1350. Indeed, a court, whether trial or appellate, has the obligation to satisfy itself of its subject matter jurisdiction; therefore, a court may raise the question sua sponte. Id. See also, In re Wolverine Radio Co., 930 F.2d 1132, 1137 (6th Cir. 1991) ("[F]ederal courts are courts are courts of limited jurisdiction and have a continuing obligation to examine their subject matter jurisdiction throughout the pendency of every matter before them."). Accordingly, before addressing the merits of Plaintiffs' claims, the Court turns to the issues raised by Defendants' motion to dismiss for want of subject matter jurisdiction (DOC. #38).

In their motion to dismiss, Defendants argue that the decisions of the Ohio Supreme

Court to deny Plaintiffs admission to the practice of law, because of their failure to pass the July, 1990, bar examination, were judicial determinations. As such, Defendants contend that under D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983), judicial review by a federal court of those judicial decisions by the Ohio Supreme Court, pursuant to 28 U.S.C. § 1257.[12] Consequently, the argument continues, this Court is without subject matter jurisdiction to hear this case. Thus, this Court now turns to an analysis of the Feldman doctrine.

In Feldman, the Supreme Court addressed the identical question raised by Defendants' motion to dismiss (DOC. #38), namely, to what extent does a district court have subject matter jurisdiction to hear a challenge to a decision by a state court denying a person the

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[12] Section 1257 provides, in pertinent part: (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court...

right to practice law. Feldman involved two suits brought in the United States District Court for the District of Columbia by two applicants to the District of Columbia bar, Feldman and Hickey, who had not been allowed to sit for the District of Columbia bar examination because they had not graduated from law schools approved by the American Bar Association ("ABA").[13] Feldman and Hickey claimed that the District of Columbia Court of Appeals had acted arbitrarily, capriciously, unreasonably and discriminatorily in refusing to waive the requirement that one graduate from an ABA approved law school. Additionally, they asserted that the rule was unconstitutional because it created an irrebuttable presumption that the rule was unconstitutional because it created an

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[13]The District of Columbia Court of Appeals had a rule which required applicants for the District of Columbia bar examination to be graduates of a law school approved by the ABA. Feldman did not attend law school; Hickey had graduated from a law school which was not approved by the ABA.

irrebuttable presumption that only graduates of law schools accredited by the ABA are fit to practice law, because it discriminated against those who have obtained equivalent legal training and because it impermissibly delegated to the ABA the authority of the District of Columbia Court of Appeals to regulate the bar.

The question which the Supreme Court faced in Feldman was whether the decisions by the District of Columbia Court of Appeals not to grant waivers to Feldman and Hickey were judicial decisions made in judicial proceedings, such as to deny a federal tribunal, inferior to the United States Supreme Court subject matter jurisdiction to hear their claims.[14] The Supreme Court concluded that the decisions were so made, stating:

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[14]The District Columbia Court of Appeals denied the waivers in per curiam orders which were entered in response to petitions addressed to it by counsel for Feldman and Hickey.

Admittedly, the proceedings in both Feldman's case and Hickey's case did not assume the form commonly associated with judicial proceedings. As we said in In re Summers, [325 U.S. 561, 567 (1945)], however, "[t]he form of the proceeding is not significant. It is the nature and effect that is controlling." Id. at 567.

460 U.S. at 482. In determining whether a proceeding is judicial as opposes to legislative, administrative or ministerial, the Supreme Court said in Feldman that a judicial inquiry investigates facts as they exist and enforces liabilities based upon the law as it then stands. Id. at 477. This was the situation that existed within Feldman and in the case at bar. A legislative proceeding, on the other hand, unlike the situation in both Feldman and the instant case, looks to the future by making new rules (new law) to be applied. Id

Having concluded that the proceedings were judicial in nature, the Feldman Court noted that there are two types of claims which a frustrated bar applicant could assert. The Supreme Court said:

> "the United States District Court, in denying [the plaintiff] relief, declared that there is a subtle but fundamental distinction between the two types of claims which a frustrated bar applicant might bring to federal court: The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission. The Court held that while federal courts do exercise jurisdiction over many constitutional claims which attack the state's power to license attorney involving either the rule making authority or ;the administration of rules, . . . such is not true where review of a state court's adjudication of a particular applicant is sought. The Court ruled that the latter claim may be heard, if at all, exclusively by the Supreme Court of the United States."

460 U.S. at 485 (quoting Doe v. Pringle, 550 F.2d 596,579 [10th Cir. 1976]).[15] The Feldman Court concluded:

> Challenges to the constitutionality of ;state bar rules, therefore, do not necessarily require a United States district court to review a final state-

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[15] Doe was a challenge to a decision by the Colorado Supreme Court which denied the plaintiff therein admission to the bar because he was a convicted felon.

> court judgment in a judicial proceeding. Instead, the district court may simply be asked to assess the validity of a rule promulgated in an on judicial proceeding. If this is the case, the district court is not reviewing a state-court judicial decision. In this regard, 28 U.S.C. § 1257 does not act as a bar to the district court's consideration of the case and because the proceedings giving rise to the rule are nonjudicial the policies prohibiting United States district court review of final state-court judgments are not implicated. United States district courts, therefore, have subject matter jurisdiction over general challenges to state bar rules, promulgated in nonjudicial proceedings, which do not require review of a final state court judgment in a particular case. They do not have jurisdiction, however, over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action as unconstitutional. Review of those decisions may be had only in this court. 28 U.S. C. Sec. 1257.

460 U.S. at 486. With respect to the latter class of claims, those over which a federal court does not have jurisdiction, the Supreme Court explained that a United States district court may not hear a constitutional challenge to a state court's decision in a bar admission matter when the constitutional challenge is "inextricably intertwined" with state court's decision to deny a particular bar applicant

admission to the bar because such a challenge effectively asks the district court to review the state court's decision. Id. at 482 n. 16. In short, one cannot reach and decide the constitutional issue without, at the same time, dealing with the decision to deny admission to a particular applicant to the state Bar.

In applying the foregoing pronouncement, the Feldman Court concluded that the district court did not have jurisdiction over the plaintiffs' claims that the District of Columbia Court of Appeals acted arbitrarily, capriciously, unreasonably and discriminatorily in not granting them waivers to its rule in their individual application. Id. The Supreme Court determined that the claims that the District of Columbia Court of Appeals acted arbitrarily, capriciously, unreasonably and discriminatorily inextricably intertwined with the decisions by the District of Columbia Court of Appeals denying the plaintiffs' requested waivers.

Id. at 486-87. However, the Supreme Court concluded that the district court did have jurisdiction over the plaintiffs' claims that the rule was unconstitutional on their theories that it created an irrebuttable presumption that only graduates of accredited law schools are fit to practice law, that it discriminated against those who have obtained equivalent legal training and that it impermissibly delegated to the ABA the authority of the District of Columbia Court of Appeals to regulate the bar. Id. at 487.

District courts in the Sixth Circuit have applauded Feldman to challenges to the subject matter jurisdiction of a court hearing litigation contesting the denial of a particular applicant's admission to the bar. For instance, Stanfield v. Horn, 704 F.Supp. 1487 (M.D.Tenn. 1989), affirmed, 884 F.2d 580 (6th Cir. 1989) (table), as does the present case, involved a suit in federal court any a disappointed applicant to bar. The Stanfield plaintiff claimed that by being refused

admission to the practice of law based upon the grades she received on the Tennessee bar examination, she was denied due process and equal protection of the laws. In particular, the plaintiff challenged the Tennessee rule which provided that a disappointed applicant's sole remedy was to retake the bar examination. The upshot of the Tennessee rule was that the grades given by the Tennessee Board of Law Examiners on the bar examination were final with no right to have the scores reviewed by the Tennessee Supreme Court. The rules also provided that the Board would not discuss with the disappointed applicant his or her responses to the questions on the bar examination. The district court concluded that it did not have subject matter jurisdiction over the plaintiff's claims, because the plaintiff's primary contention was that her examination had been improperly graded and that, as a consequence, she had been wrongly denied admission to the Tennessee bar.

In Ronald Smith, et al. v. Frank Celebrezze, et al., Case No. 90-CV-1874 (N.D.Ohio October 18, 1992)(unreported),[16] Judge Bell dismissed, for want of subject matter jurisdiction, a lawsuit brought by individuals who had failed the Ohio bar examination on at least two occasions. The Smith plaintiffs alleged that they were denied their constitutional rights because there is no appeal process from the grades that applicants receive on their bar examinations and because bar exam repeaters are treated differently than first time takers of the exam. Judge Bell reasoned that the plaintiffs' claims were inextricably intertwined with the Ohio Supreme Court's judicial determination denying them admission to the bar.

Initially, this Court must decide whether Feldman applies to the present case. In particular, this Court must decide whether the

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[16]A copy of Smith is attached to Defendants' motion dismiss (Doc. #38).

decisions to deny Plaintiffs admission to the bar based upon their grades on the bar examination were judicial decisions made in judicial proceedings. In Ohio, the scores awarded to a bar examinee by the Board are final, and there is no appeal to the Ohio Supreme Court. Gov. Bar R. I, § 5(D). Thus, the Board and not the Ohio Supreme Court awarded the scores of which the Plaintiffs complain.[17] Nonetheless, the Court concludes that the Board acted in judicial proceedings, within the meaning of Feldman, when it awarded the scores to Plaintiffs. To reach this conclusion, the Court engages in a two-step analysis. Initially, the Court must examine the question of whether the actions of bar admission committees appointed by state supreme courts, such as the Board herein, are considered judicial proceedings. Second, if the answer to the first question is "yes," the

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[17]Of course, the Ohio Supreme Court had initially established the score which each applicant must attain in order to pass the bar examination.

Court must consider whether the Plaintiffs' inability to appeal the grade awarded by the Board causes the Court to conclude that the Board did not act judicially when it assigned scores to the Plaintiffs.

All courts which have considered the first question have concluded that an entity, such as the Board herein, incontestably an arm of a state supreme court, acts judicially when it acts on behalf of the state supreme court in addressing bar admission questions. For instance, in Nordgren v. Hafter, 789 F.2d 334 (5th Cir.), cert. denied 479 U.S. 850 (1986), the Fifth Circuit held that the Mississippi Board of Bar Admissions was an arm of the Mississippi Supreme Court, and that, therefore, it was acting judicially, within the meaning of Feldman, when it declined to waive the rule that applicants for the Mississippi bar graduate from ABA accredited law schools. See also Thomas v. Kadish, 748 F.2d 276 (5th Cir. 1984), cert. denied, 473 U.S. 907 (1985) (Texas bar admissions

committee acted in a judicial proceeding when it denied admission to an applicant on the basis of emotional and mental fitness.); Stanfield, supra.

As is noted above, the Plaintiffs did not have the right to appeal the grades which they received on their bar examinations to the Ohio Supreme Court. Therefore, the Court must next decide if the absence of such a right to appeal indicates that the decision of the Board was not made in a judicial proceeding. In Stanfield, the district court concluded that the absence of a right to appeal to the Tennessee Supreme Court did not mean that the Tennessee Board of Law Examiners did not act judicially when it administered the bar examination and assigned a score to a particular examinee's answers to the questions on the bar examination. The Stanfield court reasoned that the Tennessee Board of Law Examiners was acting on behalf the Tennessee Supreme Court when it administered the bar exam and assigned scores. Similarly, the Ohio

Board of Bar Examiners acts on behalf of the Ohio Supreme Court when it administers the bar examination and assigns scores, pursuant to the delegation of authority from the Ohio Supreme Court.[18] Moreover, the assignment of grades to the Plaintiffs was a judicial as opposed to a legislative act in that such grades were based upon the Plaintiffs; answers to the questions on the examination, a look backward to existing facts, rather than the creation of new rules that would govern this or future bar examinations. Accordingly, as with the district court in Stanfield, a case which is indistinguishable from the present litigation, this Court finds that the Board, when it assigned scores to the Plaintiffs, acted in a judicial proceeding within the meaning of Feldman.

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[18]The Ohio Supreme Court has original jurisdiction over the admission to the practice of law. Ohio Constitution, Art. IV, § 2(B)(1)(g). See also, In re February, 1986 Ohio Bar Examination Applicant No. 83, 60 Ohio St.3d 602, 573 N.E.2d 37 (1991); In re July, 1986 ohio bar Examination Applicant No. 719, 61 Ohio St. 3d 307, 574 N.E. 1047 (1991).

Nevertheless, Plaintiffs argue that Feldman does not apply, since they did not have a reasonable opportunity to raise their constitutional claims because they could not appeal their grades to the Ohio Supreme Court. Federal courts have held that Feldman applies only hen "the plaintiff [in the federal action] had a reasonable opportunity to raise his federal claim in the state proceedings." Wood v. Orange County, 715 F.2d 1543, 1547 (11th Cir. 1983), cert. denied, 467 U.S. 1210 (1984). See also, Texaco, Inc. v. Penzoil Co., 784 F.2d 1133, 1144-45 (2d Cir. 1986), reversed on other grounds, 481 U.S. 1 (1987); Robinson v. Avrivoshi, 753 F.2d 1468 (9th Cir. 1985), vacated on other grounds, 477 U.S. 902 (1986). Here, the Plaintiffs argue that the evidence demonstrates that they did not have such an opportunity. For instance, as is stated above, the rules of the Ohio Supreme Court provide that "[t]he scores as determined by the Board shall be final." Ohio Gov. Bar R. I § 5(D). Additionally, Graham has

submitted an affidavit in which he states that, after he received his results on the bar examination, he contacted Defendant Marcia J. Mengel, secretary of the Board, and was told that the Ohio Supreme Court would not review his examination. Mengel told Graham that an attempt to submit an application to have the Ohio Supreme Court review his examination would be a futile act.

In addressing this contention of the Plaintiffs, the Court's analysis is effected by three considerations. First, This Court must focus on the question of whether the Plaintiffs had an opportunity to raise their federal claims and not whether those claims were actually addressed. See Feldman, 460 U.S. at 482 n.16 (rejecting Dasher v. Supreme Court, 658 F. 2d 1045 [5th Cir. 1981]); Wood, 714 F.2d at 1546-47. The Dasher Court said if a litigant does not raise a federal claim in a state proceeding, federal courts may address that claim. The Feldman Court rejected that holding in the context of challenges to bar

examination results, upon the theory that the constitutional claims are so inextricably intertwined with the state court's denial of a particular petitioner's application for admission to the bar, as to put the United States district court in a position of reviewing the state court's judicial decision made in a judicial proceeding.[19] Second, one must bear in mind the nature of the proceedings before the District of Columbia Court of Appeals in Feldman. The District of Columbia Court of Appeals merely entered per curiam orders denying the requested waivers of Feldman and Hickey. The Feldman Court recognized that those proceedings "did not assume the form commonly associated with judicial proceeding." Nevertheless, the

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[19]The Feldman Court said: If the costitutional claims presented to the United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence being called upon to review the state-court decision 460 U.S. at 482 n.16.

Feldman Court concluded that denial of waivers were judicial proceedings. Therefore, the Plaintiffs at bar need not have the opportunity to formally litigate their federal claims. Third, the question presently before the Court is its subject matter jurisdiction, the burden of proof of which rests upon the Plaintiffs. With these considerations in mind, the Court turns to the precise question of whether the Plaintiffs have demonstrated that they did not have the opportunity to raise their federal claims in the state proceedings. The Court agrees with the plaintiffs that they did not have the opportunity to have the Ohio Supreme Court regrade their examinations. However, this fact does not answer the germane inquiry, to wit: did the Plaintiffs have the opportunity to raise their federal claims with the Ohio Supreme Court or with the Board. There is simply no indication before the Court that Plaintiffs could not have presented their substantive due process claim to the Ohio

Supreme Court. The evidence demonstrates that the Ohio Supreme Court would not regrade the Plaintiffs' examination papers; however, there is simply no indication that the Ohio Supreme Court would not have considered a constitutional challenge to the bar examination. Cf. In re February, 1986 Ohio Bar Examination Applicant No. 83, 60 Ohio St.3d 602, 573 N.E.2d 37 (1991) (Under its constitutional authority to govern admission to the bar, Ohio Supreme Court sua sponte raises the question of whether an applicant actually passed the bar examination more than five years earlier.); In re July, 1986 Ohio Bar Examination Applicant No. 719, 61 Ohio St.3d 307, 574 N.E.2d 1047 (1991). Accordingly, this Court concludes that they did have an opportunity to raise their federal claims in the state proceedings.

Having concluded that the Board assigned the Plaintiffs their scores on the July, 1990, bar examination in a judicial proceeding and that, consequently, Feldman does apply, the

Court turns to the question of whether the Plaintiffs' claims are of the type which the Feldman Court held that a district court has subject matter jurisdiction to hear. Here, the Plaintiffs contend that the manner in which their bar examinations were graded was arbitrary and capricious, in violation of their right to substantive due process. Although they point to no particular rule of the Ohio Supreme Court which they assert deprives them of any constitutional rights, Plaintiffs contend that they are mounting a constitutional challenge to a broad rule of that court. Plaintiffs contend that the Supreme Court has a rule which allows examination papers to be graded in the absence of standards governing their grading. The heart of the Plaintiffs' claims is that Jacobs' grading was unfair; indeed, so unfair that it was a deprivation of substantive due process. It is simply not possible for the Court to rule on Plaintiffs' claims or to grant them the primary relief sought, an order

committee responsible did not actually exercise professional judgment." Id. at 225. Only when there is such a substantial departure is a court permitted to conclude that the decision was not related to the student's fitness to remain a student (or, in this case, an applicant's fitness to practice law). Id.

Here, the Court has found that Jacobs exercised professional judgment in method by which he graded the examinations. However, Plaintiffs' claims are broader than merely an attack on the manner in which Jacobs graded his portion of the bar examination. Rather, Plaintiffs challenge (and blame the Supreme Court Defendants for) the lack of grading standards and uniformity among the examiners. See Doc.#32. Thus, were this Court to reach the merits, it would be called upon to determine whether the July, 1990, bar examination, taken as a whole, was such a substantial departure from accepted norms that it demonstrates that professional judgment was

the merits of Plaintiffs' claims. However, the Court does make a number of observations about these claims. The parties herein agree that the proper analytical framework for Plaintiffs' substantive due process claim is that which was set forth in Regents of the University of Michigan v. Ewing, 474 U.S. 213 (1985). See Docs. #31, at 1; #32, at 9. Ewing was a law suit brought by a student who was dismissed from the University of Michigan ("University") after failing an examination.[20] Ewing argued that the University misjudged his fitness to remain a student. The Supreme Court held that substantive due process could not be violated unless there was "such a substantial departure from accepted academic norms as to demonstrate that the person or

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[20]Among other relief, Ewing sought an order from the district court directing the University to grant him the opportunity to retake the examination, the failure of which led to his dismissal. Thus, there is an important difference between Ewing and the present case. Here, the Plaintiffs have the right to retake the Ohio bar examination. Indeed, Deffet and Carey have retaken and have passed the Ohio bar examination.

admitting them to the Ohio Bar, without considering the grades which they were given. Therefore, assuming for the sake of argument that the absence of such standards is a rule of the Ohio Supreme Court, that challenge is inextricably intertwined with the decision of the Board on what grades the Plaintiffs should receive on their respective examinations and whether they should have been admitted to the Ohio Bar. Accordingly, regardless of whether the Plaintiffs allege that they were denied their constitutional right to substantive due process, Feldman mandates that this court refrain from hearing this case.

Based upon the foregoing, the Court concludes that it does not have subject matter jurisdiction over Plaintiffs' claims, and therefore, it sustains Defendants' motion to dismiss for want of subject matter jurisdiction. (Doc. #38).

Finally, because it has concluded that it does not have subject matter jurisdiction over this case, the Court does not make a ruling on

not exercised and, consequently, that the examination was not related to the Plaintiffs' fitness to practice law.

III. CONCLUSIONS OF LAW

1. Pursuant to the Feldman doctrine, this Court does not have subject matter jurisdiction over this dispute.

Based upon all the foregoing, the Court orders that judgment be entered for the Defendants and against the Plaintiffs dismissing Plaintiffs' second amended complaint (Doc. # 24) for want of subject matter jurisdiction.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

WALTER HERBERT RICE

UNITED STATES DISTRICT JUDGE

APPENDIX J

SECTION 1257:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by The Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

APPENDIX K

The Fourteenth Amendment in pertinent part

Section 1.

...nor shall any State deprive any person of life, liberty or property, without due process of law....

APPENDIX L

Title 28 U.S.C.

§ 1331 Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

§ 1343 Civil Rights and Elective Franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of citizen of the united State, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any other Act of Congress providing for the protection of civil rights, including the right to vote....

APPENDIX M

O Const IV § 2 Organization and jurisdiction of supreme court

...
(B)(1) The Supreme Court shall have jurisdiction in the following:

...
(g)Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.
...
(2)...
(iii) Cases invloving questions arising under the consitution of the United States or of this state.

(2)

Supreme Court, U.S.
FILED
AUG 16 1996
CLERK

No. 95-123

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

R. WILLIAM GRAHAM,
Petitioner,

v.

MARCIA J. MENGEL,
Clerk of the Supreme Court of Ohio
and Secretary of the Board of Bar Examiners, et al.,
Respondents.

BRIEF IN OPPOSITION TO
A PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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I

THE QUESTION PRESENTED

Whether the Ohio Court of Claims erred in all three of the following respects:

(1) determining pursuant to Ohio law that it was without jurisdiction to consider the Petitioner's constitutional claims; (2) applying the doctrine of judicial immunity with respect to any and all damage claims of the Petitioner; and (3) making the factual determination that the Respondents' conduct did not rise to the level of negligence (or lack of professional judgment) and did not proximately cause Petitioner's harm.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

R. WILLIAM GRAHAM
Petitioner,

v.

MARCIA J. MENGEL, Clerk of the Supreme Court of Ohio and Secretary of the Board of Bar Examiners, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

OPINIONS BELOW

Respondent's Appendix B is the Supreme Court of Ohio's April 21, 1992 dismissal of the Petitioner's second lawsuit to the extent he sought damages and injunctive relief.

Respondent's Appendix C is this Court's December 6, 1993 second denial of the Petitioner's writ of certiorari.

Finally, Appendix D sets forth the Court of Claims' May 14, 1992 pre-screening entry. The remaining opinions are adequately set forth in the Petitioner's Brief.

STATEMENT OF THE CASE

A. Procedural Posture

R. William Graham, the sole Petitioner, failed the July, 1990 Ohio Bar Examination. He and two other unsuccessful applicants, who have subsequently re-taken and passed the bar examination and have not joined in this action, filed a lawsuit which was dismissed by the United States District Court for the Southern District of Ohio on February 19, 1992, for lack of subject matter jurisdiction. (Petitioner's Appendix I). The United States Court of Appeals for the Sixth Circuit affirmed this decision in an unpublished decision on February 3, 1993. (Petitioner's Appendix H). This Court denied certiorari for the first time on June 21, 1993. (Petitioner's Appendix G).

In the meantime, Graham filed a second lawsuit in the Supreme Court of Ohio, allegedly under that Court's original jurisdiction. The Ohio Supreme Court on April 21, 1992, entered an order dismissing the Complaint to the extent that it sought damages and injunctive relief, which are outside of that Court's jurisdiction. (Respondents' Appendix B). While the Court dismissed the individual Defendants from the case, it initially retained the remainder of the Complaint as an application to exercise its original jurisdiction over the admission to practice law and to render a declaratory judgment with regard to the constitutionality of the procedures followed in connection with the July, 1990 Ohio Bar Examination. (Respondents' Appendix B). Subsequently, the Ohio Supreme Court dismissed that case sua sponte for want of jurisdiction. (Petitioner's Appendix E). This Court again denied certiorari on December 6, 1993. (Respondents' Exhibit C).

The Petitioner filed a third Complaint in the Ohio Court of Claims on May 8, 1992, against the Clerk of the

Ohio Supreme Court, in her capacities as clerk and secretary of the board, the justices of the Ohio Supreme Court, individually and in their official capacities, and the members of the Board of Bar Examiners, individually and in their official capacities. The Court of Claims dismissed the individual Defendants pursuant to §2743.02 on May 14, 1992, and the Petitioner has not appealed this dismissal. (Respondents' Appendix D). The Court entered its summary judgment decision in favor of the remaining Defendants on February 18, 1994. (Petitioner's Appendix C). The Court of Appeals for Franklin County affirmed this decision on September 15, 1994. (Petitioner's Appendix B). The Ohio Supreme Court denied further review of this matter on April 25, 1995. (Petitioner's Appendix A).

B. Statement of Facts

The relevant facts in this case have been set forth both by the Court of Claims and by the District Court. (Petitioner's Appendices C & I). The fact which the Petitioner finds upsetting is that one of the twelve bar examiners was more stringent than the other eleven. (R. William Graham at Tr. 29-30, 37-39, 47-49).

It was unequivocally established before the District Court that the examiner in question was conscientious in his grading, that he carefully and thoughtfully exercised his professional judgment in his performance of his assigned tasks, that he gave high grades to the same applicants who received high grades from other examiners, that he gave low grades to the same applicants who received low grades from other examiners (Tr. 142, 144), that he had an impressive professional background and extensive experience in evaluating basic legal skills as expressed in the written work of young lawyers (Tr. 186-187), that he articulated and consistently applied an intelligent set of criteria for evaluating the essays he was assigned to grade (Tr. 194-196), and that he devoted 125 hours of his life and professional judgment to his assigned task. (Tr. 196). It was also established that every successful applicant who did not obtain a shortcut to success through the presumptive pass phase of the examination had his or her examination efforts subjected to precisely the same scrutiny from the examiner in question as were the Petitioner's efforts. (Tr. 144). Based upon the submission of these and other facts, the Court of Claims concluded that "Defendants did not act negligently and the Defendants' acts or omissions did not proximately cause Plaintiff's harms." (Petitioner's Appendix C at 7). Both the District Court and the Court of Claims also determined that the Ohio Supreme Court had made discretionary decisions and that the examiner in question zealously exercised his professional judgment. (Petitioner's

Appendix I at 11; Petitioner's Appendix C at 16).

Despite at least eight opportunities, the Petitioner has refused to pursue the always available remedy of re-taking the bar examination. Instead he has filed his third Petition for Writ of Certiorari to this Court.

SUMMARY OF THE ARGUMENT

The Ohio Court of Claims granted summary judgment in favor of the Defendants on the basis of judicial immunity and upon a determination that the Respondents' conduct neither rose to the level of negligence (or lack of professional judgment), nor constituted the proximate cause of the Petitioner's injuries. The Court held that pursuant to the Ohio Revised Code it was without subject matter jurisdiction to review the Petitioner's due process claims. This Court should defer to that Court's interpretation of Ohio law.

ARGUMENT

This case presents no constitutional questions. In granting summary judgment, the Court of Claims correctly noted that it did not have jurisdiction to rule on constitutional questions.

The Ohio Legislature abrogated its immunity and provided that the State may be liable in the Court of Claims "in accordance with the same rules of law applicable to suits between private parties." **Ohio Revised Code** §2743.02(A)(1). Ohio courts have consistently adhered to the legislature's mandate and have refused to rule on constitutional questions when they are presented in the Court of Claims. E.g., Thompson v. Southern State Community College, No. 89AP-114, (10th Dist. June 15, 1989). Similarly, the Court correctly noted that the Respondents' Section 1983 and 1985 claims may not be brought against the state in the Court of Claims. Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989); Burkey v. Southern Ohio Correctional Facility, 38 Ohio St.3d 170 (1988).

Even if the Petitioner were entitled to bring his constitutional claims initially in the Court of Claims, the Court still properly granted summary judgment on two independent grounds. First, the Court of Claims properly noted that the Respondents were entitled to summary judgment on the basis of judicial immunity. The United States District Court for the Southern District of Ohio granted judgment in favor of the Respondents because it held that "the decision to deny [plaintiff]'s admission to the bar based upon [his] grades in the bar examination were judicial decisions made in judicial proceedings." (Petitioner's Appendix I at 24). In fact, both state and federal Courts of Appeals have applied the doctrine of judicial immunity to bar the precise kinds of claims that are

at issue in this case. Sparks v. Character & Fitness Committee of Ky., 859 F.2d 428, cert. denied, 489 U.S. 1011 (1988); Hampton v. Tennessee Bd. of Law Examiners, 770 S.W. 2d 755, 757 (1989).

Finally, the Court of Claims made a well-reasoned and careful analysis of the facts and noted that "while the presumptive pass rule certainly served to focus the energies of the bar examiners more closely upon certain applicants, it was Plaintiff's total performance that determined whether he passed or failed." (Petitioner's Exhibit C at 14). Perhaps the merits of the matter were best summed up by the Franklin County Court of Appeals as follows:

> Even if we construe the foregoing in favor of Plaintiff, we are unable to conclude that Plaintiff has demonstrated a genuine issue of material fact concerning a violation of his due process rights. While the District Court's findings may suggest that the Defendant could have better instructed the individual bar examiners regarding a uniform approach to grading the bar examination essays, the evidence fails to support Plaintiff's contentions that Defendants' failure to so instruct is tantamount to a lack of professional judgment and renders the examination results unrelated to Plaintiff's ability to practice law, especially given the findings that the individual examiner Plaintiff contends to be at fault was found to have exercised his professional judgment.

(Petitioner's Appendix B at 14).

CONCLUSION

This case presents no federal constitutional issue for this Court's consideration since the Ohio Court of Claims was without jurisdiction to consider any such issue. This Court should defer to the Court of Claims' findings with respect to both judicial immunity and lack of evidence of inappropriate conduct on the part of the Respondents.

For these reasons, the Petitioner's Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

OHIO REVISED CODE

§ 2743.02 State waives immunity from liability.

(A)(1) The State hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter and, in the case of state universities or colleges, in section 3345.40 of the Revised Code, and except as provided in division (A)(2) of this section. To the extent that the state has previously consented to be sued, this chapter has no applicability.

Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

APPENDIX B

IN THE SUPREME COURT OF OHIO

R. William Graham, Plaintiff,	)	1992 TERM
	)	CASE NO. 92-566
v.	)	
Marcia J. Mengel, et al Defendants.	)	**ENTRY**
	)	To Wit: April 21, 1992

This cause originated in this Court on the filing of a complaint for damages, declaratory and injunctive relief. Upon consideration thereof,

IT IS ORDERED by the Court, sua sponte, that this cause is dismissed to the extent that the complaint seeks damages and injunctive relief, both of which are outside the jurisdiction of this Court, and that the defendants are thereby also dismissed.

IT IS FURTHER ORDERED by this Court that the remainder of the complaint shall be retained and considered an application under the Ohio Constitution, Article IV, Section 2(B)(1)(g), for this Court to exercise its original jurisdiction over admission to the practice of law and to render a declaratory judgment with regard to the constitutionality of procedures followed in connection

with the July 1990 Ohio Bar Association.

IT IS FURTHER ORDERED that plaintiff shall file his brief on the merits on or before May 21, 1992.

/s/ A. WILLIAM SWEENEY
Acting Chief Justice

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

December 6, 1993

Mr. David C. Greer
400 Gem Plaza
Third & Main Streets
Dayton, Ohio 45402

Re: R. William Graham
v. Marcia J. Mengel, Clerk, Supreme Court of Ohio and Secretary of the Board of Bar Examiners, et al.
No. 93-619

Dear Mr. Greer:

The Court today entered the following order in the above entitled case:

The Petition for a writ of certiorari is DENIED.

Very truly yours,

/s/ WILLIAM K. SUTER,
Clerk

APPENDIX D

IN THE COURT OF CLAIMS OF OHIO

R. William Graham, Plaintiff,	)	
	)	CASE NO. 92-05187
v.	)	
The Ohio Board of Bar Examiners, et al. Defendants.	)	**PRE-SCREENING ENTRY**

This case came to the court's attention in accordance with L.C.C.R. 15(B).

Under R.C. 2743.02(E), only state agencies and instrumentalities can be defendants in original actions in the Court of Claims. Accordingly, Marcia J. Mengel, Clerk and Secretary of The Supreme Court of Ohio, Members of The Supreme Court of Ohio, individually and in their official capacities, Thomas J. Moyer, A. William Sweeney, Robert E. Holmes, Andy Douglas, J. Craig Wright, Herbert R. Brown and Alice Robie Resnick, Members of the State of Ohio Board of Bar Examiners, individually and in their official capacities, Michael L. Gordon, Indra K. Shah, Leslie W. Jacobs, Phillip J. Campanella, Keith McNamara, James F. DeLeone, Larry H. James, Katheleen M. Trafford, Alan C. Travis,

Frederick Byers, John A. Harris, III and Theodore G. Gudorf are dismissed as parties in this action.

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JOURNALIZED MAY 14, 1992

/s/ _____

Case No. 92-05187 **ENTRY**

The caption of this case shall henceforth read as set out above.

It is further ordered that the plaintiff's demand for a jury trial be dismissed in accordance with R.C. 2743.11.

/s/ _____
Judge

Entry cc:

Mary Kirchner Crawford
Asst. Attorney General
65 East State Street
Suite 700
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Chief, Court of Claims
Defense Section

R. William Graham
10 Southmoor Circle N.W.
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Plaintiff, Pro se

CIVIL ACTIONS JOURNAL
VOL. 312 PAGE 026

JOURNALIZED MAY 14, 1992
BY /s/ _____

SEP 8 1995
CLERK

(3)

No. 95-123

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

R. WILLIAM GRAHAM
Petitioner,

v.

MARCIA J. MENGEL,
Clerk of the Supreme Court of Ohio and
Secretary of the Board of Bar Examiners,
et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS FRANKLIN COUNTY, OHIO

PETITIONER'S REPLY BRIEF

R. WILLIAM GRAHAM
8281 MCEWEN ROAD
DAYTON, OHIO 45458
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Pro se.
Argument Prepared by
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Attorney at Law
Dayton, Ohio

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ARGUMENT

Every court that Petitioner has gone to has dismissed the lawsuit for lack of subject matter jurisdiction. This includes (a) the United States District Court for the Southern District of Ohio Western Division; (b) the Supreme Court of Ohio; and (c) the Court of Claims of Ohio. In each instance, Petitioner appealed the court's decision. In (a) above, Petitioner's appeal of the District Court's Decision was affirmed by the Court of Appeals for the Sixth Circuit. Certiorari was denied by the Supreme Court of the United States. In (b) above, Petitioner's Writ of Certiorari of the Ohio Supreme Court's decision was denied by the Supreme Court of the United States. In (c) above, Petitioner's appeal of the Court of Claims decision was affirmed by the Court of Appeals of Ohio, Tenth

Appellate District, and the appeal to the Ohio Supreme Court was denied on jurisdictional grounds. Now Petitioner is again asking the Supreme Court of the United States to grant Writ.

What if Writ is denied again? Is it possible that <u>all</u> these courts are correct -- that there is nowhere Petitioner can go to have his claim heard on the merits? That no court has subject matter jurisdiction? Obviously, this cannot be. Every claim has one court that has jurisdiction to hear the matter on its merits, and particularly so when the claim is one of constitutional issues. Or am I wrong?

For the Supreme Court of the United States to refuse Petitioner's claim now on the merits and uphold all these lower court decisions (that they did not have subject matter jurisdiction) is to violate

the very principle our judicial system is built upon -- <u>everyone</u> is entitled to Due Process of law, and that includes having the right to have at least one tribunal have subject matter jurisdiction over a claim. This is an inalienable right that is the very foundation of our judicial system.

On another front, Respondents are attempting to "pull the wool over" this Honorable Court's eyes by asserting (in their statement of facts) that the Federal District Court judge's decision and the Court of Claims judge's decision (both of which found against Petitioner on the merits of the case) dispose of the case on its merits. In fact, both judge's findings have no legal significance because both courts threw out the cause of action on jurisdictional grounds.

Respondents have no valid ground to

deny there was a violation of Petitioner's substantive Due Process and Equal Protection rights, and the proof of it is that they never addressed one single contention raised by Petitioner's forty-seven page argument asserting the denial of Petitioner's constitutional rights. Instead, Respondents merely asserted that the Federal District Court and the Ohio Court of Claims had already decided the substantive issues on the merits. That is like saying "our position should be upheld because it was decided that way in the lower court." That is no argument whatsoever. Petitioner filed a forty-seven page argument saying that the substantive law is on Petitioner's side. Respondents never addressed Petitioner's

Argument at all.[1]

Apparently, Respondents feel that this Honorable Court should and will not make its own independent analysis of the substantive issues in this case. Respondents seem to feel that the Supreme Court of the United States will just "rubber stamp" a lower court's findings. Consequently, they must have felt there is

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[1] Petitioner notes a typographical error occurred in his Writ at page 61, line 1, wherein after the word "graded" the words "do not" should have been included. The sentence should read "In other words, Mr. Jacobs concluded that 98.6 percent of the students he graded do not have minimum competency." Additionally, it should be noted that the following facts were omitted from Petitioner's Writ. Petitioner received an average score of 7.5 points out of 10 points per question on the two questions given and graded by eleven out of twelve examiners. The other remaining examiner, Mr. Jacobs, gave Petitioner an average score of 3.25 points on the two questions he graded resulting in Petitioner not passing the July 1990 Ohio Bar Exam by merely two points.

no reason to address any of the points raised in Petitioner's forty-seven page argument. Anyone reading Petitioner's argument would agree that Petitioner has presented a legitimate Federal constitutional issue for this Honorable Court's consideration.

Furthermore, summary reversal by this Honorable Court is in order because the Supreme Court of the United States has said a state cannot stop a person from practicing law "in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." Though a state can require high standards of qualification before it admits an applicant to the bar, the Supreme Court of the United States has furthermore said "any qualification must have a rational connection with the applicant's fitness or capacity to

practice law." Federal Appellate Courts have said that courts may review the substance of an academic decision when the decision by the professional is "a substantial departure" from accepted professional practices, standards, or norms as to demonstrate the person did not actually exercise professional judgment.

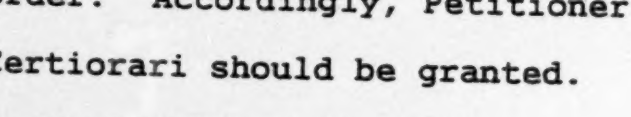
When one of the examiners of Petitioner's bar exam admitted he did not apply the same minimum competency percentage score set for the overall exam to the answers he graded, he violated professional practices, standards, and norms in grading because it is the adoption of the uniform minimum competency score for each answer that produces the minimum competency percentage score set for the overall exam. Consequently, there occurred a "break in the rational connection" between the test results and

the Petitioner's fitness and capacity to practice law, and, therefore, to preclude Petitioner from practicing law for not passing such an exam denied Petitioner the right to practice law for "reasons that contravene Due Process and Equal Protection Rights." Consequently, Summary reversal is indeed the appropriate remedy by this Honorable Court.

CONCLUSION

For the reasons stated above, a clear and present Federal constitutional issue cries out for this Honorable Court's review so much that summary reversal is in order. Accordingly, Petitioner's Writ of Certiorari should be granted.

Respectfully submitted,



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